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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON AND ELIN ELIASON,
*Appellants,*

*vs.*

CHARLES WILBORN, CARRIE S. WILBORN AND NOEL STATE BANK,
*Appellees.*

APPEAL FROM THE SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

## BRIEF OF APPELLEES.

FLOYD E. THOMPSON,
HENRY JACKSON DARBY,
*Solicitors for Appellees.*

DUNLOP-GARVEY PRINTING COMPANY, CHICAGO.

IN THE

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## BRIEF OF APPELLEES.

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### MOTION OF COOK COUNTY REAL ESTATE BOARD TO APPEAR AS AMICUS CURIAE AND TO JOIN IN BRIEF OF APPELLEES.

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Appellees, Charles and Carrie S. Wilborn, defended this suit in the Circuit Court of Cook County and the Supreme Court of Illinois, but did not feel financially able to continue to bear the burden alone and to employ counsel to follow the appeal here. With their approval, and in co-operation with the Registrar of Titles of Cook County, Illinois, the Cook County Real Estate Board of Chicago, Illinois, have employed members of this bar to

represent appellees and to defend the interests of the people of Cook County, Illinois, in this case. The Cook County Real Estate Board is composed of 924 real estate dealers and others interested in real estate titles in Cook County. These members own much valuable land registered under the Land Titles Act of Illinois and represent thousands of clients who own millions of dollars worth of registered lands.

The members of the Cook County Real Estate Board are vitally interested in this litigation and they join the Registrar of Titles in asking leave to appear as *amici curiae,* and to join in this brief of appellees.

Respectfully submitted,

FLOYD E. THOMPSON,
HENRY JACKSON DARBY,
*Solicitors for Cook County Real Estate Board and of Counsel for the Registrar of Titles.*

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APPEAL FROM THE SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

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## BRIEF OF APPELLEES.

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### STATEMENT OF THE CASE.

We are of the opinion that a proper presentation of this case requires us to supplement the statement of the case by appellants by adding (1) an analysis of the petition filed by appellants in the Circuit Court of Cook County, Illinois, (2) an analysis of the Illinois Act Concerning Land Titles of May 1, 1897, (3) a history of land title registration acts, commonly known as the Torrens System of Land Title Registration, and (4) a statement of the points that were presented for decision to the Supreme Court of the State of Illinois.

**ANAYLSIS OF THE PETITION FILED IN THE CIRCUIT COURT OF COOK COUNTY.**

The petition filed by appellants in the circuit court of Cook County is unusually significant.

(1) It is a petition expressly—and *solely*—authorized by the Land Title Registration Act, which appellants now say is contrary to the Fourteenth Amendment to the Federal Constitution.

(2) It conclusively demonstrates that appellants voluntarily accepted this purely elective act.

(3) It proceeds upon the assumption that the act requires that appellants be granted the relief asked.

(4) It does not predicate appellants' alleged right to relief upon any actual or contingent conflict between the act and the Fourteenth Amendment. On the contrary, *it seeks to protect a claimed antecedent and paramount title that had been acquired and registered pursuant to the act and never existed apart from it.*

(5) It shows that whatever loss appellants may ultimately suffer is directly attributable to their own negligence and not to any provision of the act.

This proceeding is brought pursuant to sections 93 and 94 of the Land Title Registration Act (R. 17) by filing a petition "in the circuit court in the proceeding in which the land was registered" originaly. Appellants did not seek relief by a bill in equity or other appropriate proceeding, but asked relief which can be had under—and *only* under—an act which they now say is void.

Appellants allege in their petition that "by virtue of a

decree of this court made and entered in the above entitled cause on the 6th day of August, A. D. 1921", the real estate in controversy "was duly registered in the office of the registrar of titles in and for said county, in the names of Edward J. Haley and Mary A. Haley, • • • and a certificate of title was *duly issued* to them therefor" (R. 1,) and then that "by mesne and sundry conveyances and transfers the *title* to said premises *has passed and become vested in your petitioners*, Edward Eliason and Elin Eliason, • • • and that a certificate numbered 113893, *registering* the *title* to said premises in your petitioners, was *duly issued* out of the office of the registrar of title in and for said county, on September 21, 1923, and *duly entered* in Register Volume 197, at page 308." R. 1-2.

Appellants also alleged "that in the month of May, 1926, they entered into certain negotiations with one Jerome C. Napletone, doing business as Bankers' Discount Company, for the sale to the said Napletone" of the real estate in question, subject, among other things, to a contract for its sale to George B. Kennedy and his wife, made April 1, 1926, and that "in the course of the negotiations looking toward such sale, your petitioners *intrusted* to the said Napletone a duplicate original of said contract of sale and also the *certificate* No. 113893 *evidencing* the *title* of your petitioners in and to said premises", and "that thereafter, from about May 18, 1926, until June 18, 1926, your petitioners were constantly endeavoring to obtain from said Napletone either the amount which he had agreed for said premises and said assignment of contract, or to obtain back from him the said certificate of title and duplicate original contract which had been intrusted to him, but without avail; that on said *June 19, 1926*, your petitioners found the office before that time occupied by the said Napletone closed,

and were informed from other sources that the said Napletone had defrauded various people in the City of Chicago and had fled from said City of Chicago and State of Illinois." R. 2-3.

Appellants then allege "that immediately thereafter" —that is, *after June 19*—appellants went to the office of the registrar of title where, for the first time, they learned the following facts:

(1) That on *May 19, 1926*, Napletone deposited with the registrar (a) the duplicate certificate of title No. 113983, which appellants had "*intrusted* to Napletone", and (b) a warranty deed dated *May 18, 1926*, purporting to be from appellants to Napletone covering the real estate in controversy.

(2) That the pretended deed was filed for record in the registrar's office on *May 19, 1926;* and

(3) That a certificate of title showing title to said premises in Napletone was *duly issued* by said registrar of titles on *May 19, 1926*, as certificate No. 167191. R. 3.

Appellants allege that their signatures had been forged to the deed that purported to convey the real estate to Napletone and to the assignment of the contract to sell to the Kennedys.

Appellants then allege that on *May 29, 1926*, there was filed for record in the office of the registrar of titles a deed dated *May 24, 1926*, to the real etsate in controversy, which appeared to have been executed and acknowledged by the said Napletone and which conveyed the premises to appellees, the Wilborns. Appellants further allege that Napletone also assigned and delivered to the Wilborns the duplicate original of appellants' contract of

sale with the Kennedys. It is further alleged that the other original of the contract was held by the Noel State Bank for the purpose of collecting the periodical installments of the purchase price payable thereunder.

Petitioners further allege "that they have made application to Joseph F. Haas, the registrar of title of Cook County, Illinois, requesting him to cancel and remove from his records the entries showing the two deeds hereinabove described and set forth, and that the certificates issued to the said Jerome C. Napletone to the said Charles Wilborn and Carrie S. Wilborn be by him ordered delivered up and cancelled, and *that a certificate be issued to your petitioners* correctly setting forth the title to said premises in your petitioners, but that the registrar has refused so to do."

Petitioners then say that, inasmuch as they are without remedy "save in a court of equity and *this proceeding*", they pray:

> "(1) That this court may decree the said purported two warranty deeds and the said purported assignments of contract hereinabove set forth, and each of them, be null, void and of no effect upon the title to said premises, or the interest of your petitioners thereto;
>
> (2) That the said registrar of titles may be ordered and directed by decree of this court to cancel and annul said certificates No. 167191 and 175048, and each of them, and that the same may be expunged and cancelled upon the records of said registrar of titles;
>
> * * * * *
>
> (3) That this court may enter an order and decree *finding* the *title* to the premises aforesaid now vested in your petitioners, Edward Eliason and Elin Eliason, his wife, as joint tenants, *free and clear of all liens and encumbrances,* except such as appear upon the certificate numbered 113893, heretofore is-

sued to your petitioners, and subject only to said first mortgage for Twenty-seven Hundred Dollars ($2700), and the rights of the said George B. Kennedy and Pearl A. Kennedy, his wife, as purchasers under said contract of sale, and parties in possession."

Was it the theory of appellants' petition that the Illinois Land Title Registration Act was void because in conflict with constitutional limitations? Not at all. *Appellants invoked this act and asked for the protection of alleged rights acquired thereunder and from no other source.* And this, too, by means of a petition filed "in the proceeding in which the land was registered", originally,—a remedy that the act itself and only the act authorizes.

It is significant that the petition filed purports to be a petition to control the actions of the registrar of titles of Cook County, but *the registrar of titles was not served with summons.* Demurrers of other defendants to the petition were sustained in the circuit court of Cook County (R. 10-14) and the action of the circuit court was affirmed by the Supreme Court of Illinois. R. 26.

It is also significant that though this proceeding is one to control the action of the registrar of titles, there is no allegation of fraud on his part or that he did not proceed strictly in accordance with the provisions of the statute relating to transfers by deed. It must be assumed therefore that the registrar did his duty and compared the signatures on the deed with the genuine signatures on file in his office, as required by Section 37, and that by a proper inquiry he ascertained that the transferror, Napletone, had the title proposed to be transferred and was entitled to make the conveyance, as provided in section 47.

It is also significant that there is no attack in the petition on the good faith of the Wilborns. Their rights can be dealt with only on the basis that *they are purchasers for value without notice.* The farthest that appellants go is the manifestly irrelevant allegation "that prior to the issuance" of the certificate of title to them the Wilborns had knowledge of appellants' claim. (R. 14.) The title was registered in Napletone *May 19, 1926,* (R. 3,) which was prior to Napletone's deed to the Wilborns. (R. 4.) Appellants themselves discovered nothing until *June 19, 1926.* Their notice to the registrar was after that date. (R. 3.) All the documents delivered to the Wilborns by Napletone were regular on their face. (R. 3.) They had been acknowledged before a notary and they passed muster at the registrar's office where the Wilborns' signatures were on file, as required by section 37 of the act.

The allegation in the petition that the premises in question "were duly registered" and that "a certificate numbered 113893, registering the title to said premises in your petitioners, was duly issued", is equivalent to saying that appellants have entered into "an agreement which shall run with the land, that the same shall be subject to the terms of the act and all amendments and alterations thereof", as provided in section 46. (Appendix, p. 67, *infra.*) This agreement includes the provisions of the act making the registration by the registrar of titles (sec. 49) and not the delivery of a deed by the grantor (sec. 54) the essential element in a transfer of title.

Appellants contend that they want this property *in specie* and not its value in money. They ask this court to declare unconstitutional *a statute that has been in force in Illinois for 33 years and under which more than*

*a billion dollars worth of real estate has been registered* because they must accept the money equivalent of their land in place of their land. Their petition shows they had bargained to sell this land to the Kennedys and that they were selling their equity in it when they "intrusted" their duplicate certificate to Napletone. It is evident they do not want the property itself. What then do they want? Surely they do not desire to destroy this workable, valuable, established system of title registration when it will gain them nothing. If they do so desire, this court will not set up a straw man to knock it down. They will lose nothing by Napletone's fraud if they are not a party to it. How can they be deprived of property in view of the facts?

Appellants, by their petition, protest against appellees' certificate being "free and clear" of all liens, encumbrances and charges except those noted thereon, but *they ask the circuit court to enter a decree finding title in them* "free and clear of all liens and encumbrances, except such as appear from the certificate No. 113893 heretofore issued to your petitioners," subject to the mortgage and contract of sale. They ask for the benefits of the act but do not want to accept its burdens.

*The fact is that Napletone would have been powerless to harm appellants or to deceive anyone else if appellants had not "intrusted" to him their duplicate certificate of title and the duplicate original of the contract between appellants and the Kennedys. Appellants are the victims of their own misplaced confidence in Napletone. Why should anyone else, especially innocent purchasers for value, pay the price of appellants' gullibility?*

## ANALYSIS OF ILLINOIS LAND TITLE ACT.

We have set forth in an appendix to this brief the pertinent sections of the Illinois Land Title Registration Act in full and have indicated the subject matter of the other sections for the convenience of the court. The act, as now in force, will be found published as paragraphs 45-152 of chapter 30, Smith's Illinois Statutes, as paragraphs 49-157 of chapter 30 of Cahill's Illinois Statutes, and at pages 1809-1841 of volume 2, Callaghan's Illinois Statutes Annotated.

The present act is the Act of May 1, 1897, which was passed as an emergency measure immediately after the Supreme Court of Illinois had held the first act unconstitutional. The act was thereafter adopted by the people of Cook County in accordance with section 110.

However, the adoption of the act by the people of Cook County does not automatically bring any land under the act. The owner of any estate or interest in land desiring to have his title registered under the act must apply to a court having chancery jurisdiction in the county in which the land is situated. (Secs. 7-15.) The act provides ample means for bringing in all persons claiming any estate or interest in the land, whether known or unknown, and the court is given full power to determine the estates or interests of all concerned. (Secs. 7-25.) No mortgage, lien, charge, or lesser estate than a fee simple, is registerable, unless the fee simple to the same land is first registered. Sec. 8.

The act provides that the order or decree made or entered by the court shall be binding upon all parties to the proceeding. An appeal is allowed upon like terms as in other cases in chancery and a writ of error may

be sued out of the Supreme Court within two years after the entry of the order, but not afterwards. Provision is also made for opening up the decree in behalf of any person having an estate or interest in the land who was not properly brought into court. (Sec. 26.) A limitation of two years is also placed upon actions or suits for the recovery of lands, etc. by persons who have not been concluded by the order or decree because of some irregularity, insufficiency or some other cause. Sec. 27.

After the court enters its order or decree the county recorder of deeds, who is ex-officio registrar of titles (sec. 1), registers the title as found by the court. (Sec. 29.) The act provides that the registrar of titles shall "at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations thereunder noted, which shall be delivered to the owner and shall be known as the owner's duplicate." (Sec. 36.) The registrar is required to take from the owner his receipt for the owner's duplicate certificate of title signed by him in person for the purpose of preserving evidence of the handwriting of the owner in his office, and this receipt is made *prima facie* evidence of the genuineness of the owner's signature. Sec. 37.

The certificate of title and the owner's duplicate certificate is made *prima facie* evidence in all courts and places that the provisions of law have been complied with and that the title to the land is as therein stated pending the time fixed for attack, and is made conclusive evidence of such facts after the expiration of such time. Sec. 39.

Section 40 of the act, which is set forth in full in the appendix (p. 65, *infra*,) provides that "the registered owner of any estate or interest in land brought

under this act shall, * * * except in cases of fraud to which he is a party, or of the person through whom the claims without valuable consideration paid in good faith, hold the same subject to" certain charges which are not here involved. This is the principal section involved in this suit.

Section 42 of the act provides in effect that a person taking a transfer of registered title can rely upon the certificate and is not required to make inquiry of others concerning any unregistered interest.

A registered owner of land desiring to transfer his title "may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferor has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him," the registrar shall register the title in the new owner. A new duplicate certificate of title is issued to the transferee and the old duplicate certificate theretofore surrendered is stamped "cancelled." Sec. 47.

A deed purporting to convey registered land "shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, * * * upon compliance with the terms of this act." (Sec. 54.) Other provisions of the act necessarily deal with transfers by the registrar, without a deed from the registered owner, as in the case of transfer to the heirs or devisees upon the death of the owner, (secs. 70-72).

Ample provision is made for the protection of owners in the case of the loss of duplicate certificates, (sec. 58,) and an escrow department is provided to facilitate transfers and to protect all parties pending the completion of the transaction affecting lands subject to the act. Sec. 3.

Section 93 and 94 (appendix, p. 69, *infra*) provides for appropriate proceedings in chancery where for any reason the registrar is without authority to make a particular transfer, or where he fails or refuses to make a transfer requested, or where it is desired to review his conduct with respect to the title to registered land. This proceeding is brought under these sections.

Needless to say, the Illinois Torrens Act has been the subject of attack on numerous occasions and upon almost every conceivable ground. It has withstood these attacks, as we have shown, and as a result of the decisions of the Supreme Court of Illinois it is now a valuable workable piece of legislation.

## HISTORY OF LAND TITLE REGISTRATION ACTS.

Land title registration acts are commonly called Torrens acts because they are patterned after the Real Property Act adopted by the South Australian Legislature in 1858 at the instance of Sir Robert Torrens, then Registrar-General of Deeds in South Australia. (16 Encyc. Brit.—13th ed.—165; 27 id. 60.) Torrens had previously been Collector of Customs at Port Adelaide, and he subsequently stated in an essay that he had taken the Shipping Acts for his model and that he had intended to adopt the principle of conveyance by entry in a public office. Thom Canadian Torrens System, p. 9.

This system of registering land titles, instead of recording mere evidences of title, has found favor with English speaking people everywhere. Land title registration statutes have been adopted by most of the legislative units of the British Empire, including England, Ireland, New Zealand, the Australian colonies, most of the provinces of Canada, and many of the Crown colonies. These various statutes are set out in full in Hogg on Registration of Titles to Land Throughout the Empire. These statutes differ in detail, but fundamentally they are identical in purpose and general effect.

In the United States, land title registration acts are in force in the following states and territories, the original acts being found as indicated:

California—Statutes 1897, pp. 138-167.
Colorado—Laws 1903, pp. 311-352.
Georgia—Acts of 1917, pp. 108 *et seq.*
Illinois—Laws 1897, pp. 141-165.
Massachusetts—Acts 1898, pp. 682-722.
Minnesota—Laws 1901, pp. 348-378.
New Mexico—Laws 1913, pp. 158-175.
New York—Laws 1908, pp. 1247-1283.
Nebraska—Laws 1915, pp. 494-526.
North Carolina—Acts 1913, pp. 147-159.
Ohio—Laws 1913, pp. 914-960.
Oregon—Laws 1901, pp. 438-467.
South Carolina—Acts 1916, pp. 942 *et seq.*
Virginia—Acts 1916, pp. 70 *et seq.*
Washington—Laws 1907, pp. 693-738.
Utah—Laws 1917, chap. 28.
Hawaii—Laws 1903, chap. 56.
Philippines—Acts Philippine Com. 1904, p. 151.

The earliest land title registration act in the United States was passed in Illinois in 1895, but was declared unconstitutional on the ground that it delegated judicial powers to the registrar of titles. (*People* v. *Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105.) The second land

title registration act was passed in Ohio in 1896 and it was held unconstitutional on several grounds. *State* v. *Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519.

The present Illinois land title registration act has been repeatedly attacked and as often sustained. The first and leading case dealing with the constitutional objections made to the present statute is *People* v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801. Other cases sustaining the act are *Waugh* v. *Glos*, 246 Ill. 604, 92 N. E. 974; *Mihalik* v. *Glos*, 247 Ill. 597; *Culver* v. *Waters*, 248 Ill. 163, 93 N. E. 747; *Eliason* v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

Decisions of other jurisdictions sustaining land title registration acts, in principle the same as the Illinois act, are:

*Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, (writ of error dismissed for want of jurisdiction, 179 U. S. 405);

*City of New York* v. *Wright*, 243 N. Y. 80, 152 N. E. 472;

*Ashton-Jenkins Co.* v. *Bramel*, 56 Utah 587, 11 A. L. R. 752;

*Crowell* v. *Akin*, 152 Ga. 126, 19 A. L. R. 51;

*Peters* v. *Duluth*, 119 Minn. 96, 41 L. R. A. (N. S.) 1044;

*Douglas* v. *Westfall*, 85 Minn. 437, 57 L. R. A. 297;

*People* v. *Crissman*, 41 Col. 450, 92 Pac. 949;

*White* v. *Ainsworth*, 62 Col. 513, 163 Pac. 959;

*Robinson* v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129;

*Drake* v. *Frazer*, 105 Neb. 162, 11 A. L. R. 753.

Since the Act of July 1, 1902, known as the Philippine Bill, contains a due process of law clause similar to that found in the Fourteenth Amendment to the Federal Constitution, the following cases arising under the Philippine Land Title Registration Act are pertinent:

*Alba* v. *De la Cruz*, 17 Philippine, 49;

*Jose y Narvaez* v. *Commander*, 16 Philippine, 62.

This court has had occasion to pass upon questions arising under the Philippine Act and, while it has not discussed the due process clause of the Philippine Bill, the court has treated the act as valid legislation.

*Carino* v. *Insula Government*, 212 U. S. 449;

*Jover y Costas* v. *Insular Government*, 221 U. S. 623;

*Tiglao* v. *Insular Government*, 215 U. S. 410.

This court has also had occasion to consider a case arising under the Land Title Registration Act of Hawaii.

*Lewers & Cook, Ltd.* v. *Atcherly*, 222 U. S. 285.

Although the fundamental idea of land title registration acts is of ancient origin and is by no means unknown to the common law, its adoption involved change and affected interests that profited by the existing wasteful practice of recording mere evidences of title. There was strong opposition by abstractors, title insurance companies, and others who felt that this common-sense system of registering title to land would interfere with their business. In spite of this opposition, the system grew in favor and finally received the approval of the American Bar Association. (38 A. B. A. Reports, pp. 1055 *et seq.*; 40 id. p. 929.) The Commissioners on Uniform State Laws have adopted a uniform land registration

act which has been accepted by Utah and Virginia. 9 Uniform Laws Ann. pp. 146 *et seq.*

The general purpose of the Torrens system of registration of land titles has been variously stated by courts and other authorities to be to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey the title to him, (*Glos* v. *Kingman & Co.* 207 Ill. 26); to create an independent system of registration of land titles so that all instruments intended for the purpose of passing or affecting any title to real estate registered thereunder should be filed and registered in the office of the registrar and at no other place, (*Hacken* v. *Isenberg,* 288 Ill. 589); to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested, (*Robinson* v. *Kerrigan,* 151 Cal. 40); to establish a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official made by law conclusive in that regard, (3 Tiffany on Real Property,—2nd ed.—2273); to establish a system of registration of transactions with respect to interests in land, the declared object of which is under governmental authority to establish and certify to the ownership of an absolute and indefeasible title to such land and to simplify its transfer, (Hogg's Australian Torrens System, p. 1; Niblack's Analysis of The Torrens System, sec. 8); and to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested. The basic principle of the system is the registration of the title to the land instead of registering, as under the old system, the evidence of such title. *Kemler Lumber Co.* v. *Naumann,* 301 Ill. 484.

The method used in the United States to further the object and purpose of land title registration, as described in the preceding paragraph, is a judicial proceeding. It is now clearly established by the great weight of authority that a land title registration proceeding is an action *in rem* and not *in personam*.

*Tyler* v. *Judges of Court of Registration*, 175 Mass. 71;

*Douglas* v. *Westfall*, 85 Minn. 437;

*Drake* v. *Fraser*, 105 Neb. 162;

*Stewart* v. *Kellough*, 104 Ohio St. 347.

An applicant for initial registration must establish title in himself as against the whole world before the court will enter an order directing his title to be registered. The proceeding is not a substitute for a bill in equity to remove a cloud from title, but is one which authorizes initial registration of a title only when it is good against everyone.

*Teninga* v. *Glos*, 266 Ill. 94;

*Waugh* v. *Glos*, 246 Ill. 604;

*Brooke* v. *Glos*, 243 Ill. 392;

*Glos* v. *Kingman & Co.* 207 Ill. 26.

In his Australian Torrens System, (pp. 21-22,) Hogg says:

> "The introduction of the system into South Australia was strongly opposed by lawyers of every class, from solicitors to judges, and no harder things have been said of the Torrens system generally than have been said of the South Australian Statutes in South Australia. It will probably be conceded that the English Act of 1862 was better drafted and more scientifically modelled in accordance with English

real property law. Nevertheless in New Zealand the Land Registry Act of 1860, after a trial of ten years, and in Victoria and New South Wales Bills on the same lines, were all abandoned in favor of measures based on Sir Robert Torrens' Statutes, and the Australian system has been as successful in obtaining the approval of the public as the English system has been unsuccessful. One explanation, or a partial explanation of this, seems to be that the English Acts have, by that very adherence to the forms and principles of English land law and conveyancing in which Sir Robert Torrens' Act was strikingly deficient, failed to remedy the evils incidental to the existence of the equitable estate. The South Australian Statutes grappled with these evils—certainly rather from the point of view of a layman than a lawyer—with great boldness, and at the cost of neglecting the feudal rules which underlie real property law; but the result has been the nearest approach yet made in form to allodial ownership under purely English Law."

In 54 Central Law Journal, (p. 285,) is an interesting article on the Torrens system. In the course of the article the author calls attention to the fact that Sir Robert Torrens "little knew, we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the 'unknown claimant,' the 'party entitled to notice,' the 'person under disability,' the 'absent defendant,' and other well known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property as distinguished from personalty." Nor, we may add, did he foresee the narrow path the system would have to tread through the many and various limitations of American constitutions before it could establish itself upon the legislative units of the United States. Thus far, however, the courts have held that it has been suffi-

ciently adaptable to conform with American constitutional government, and the attacks that have been made upon it have demonstrated its strength and worth.

**POINTS PRESENTED FOR DECISION.**

Appellants did not present for decision to the circuit court of Cook County or to the Supreme Court of Illinois the question they undertake to present to this court. In the state courts appellants contended:

(1) That sections 40 and 42 of the Illinois Land Title Registration Act do not by their terms include registered titles based upon forged instruments and that there is no provision in said act covering such titles; and

(2) If sections 40 and 42 of said act be held to cover, by their terms, registered titles based upon forged instruments, said sections 40 and 42 are unconstitutional and prohibited by the *Fifth* Amendment to the Federal Constitution, and section 2 of article II. of the Constitution of Illinois. Appendix, p. 72, *infra.*

Appellants admit that the Fourteenth Amendment to the Federal Constitution was not even mentioned in their original brief in the Supreme Court of Illinois. (Statement as to jurisdiction, p. 2; brief of appellants, p. 2.) By this admission they admit that the question which they contend gives this court jurisdiction of this appeal was not a question presented to the Supreme Court of Illinois. Rule 15 of the Rules of Practice of that court requires each party to file a printed brief, and as to appellants' brief says: "No alleged error or point not contained in such brief shall be raised afterwards, either by reply brief or in oral or printed argument, or on petition for rehearing." Appendix, p. 72, *infra;* 319 Ill. 16.

In *Bowe* v. *Scott*, 233 U. S. 658, this court held:

> "A mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon."

## SUMMARY OF THE ARGUMENT.

### I.

Appellees respectfully submit that this appeal must be dismissed. There is no Federal question presented on this record which gives this court jurisdiction. Appellants did not invoke the Fourteenth Amendment to the Federal Constitution in the circuit court of Cook County nor in the Supreme Court of Illinois, and cannot challenge the validity of the Illinois statute in the first instance in this court on the ground that it contravenes the Fourteenth Amendment. Furthermore, the judgment of the Supreme Court of Illinois is based on grounds which do not involve the decision of a Federal question, and so no Federal question is presented for review. (pp. 26-27, *infra.*)

### II.

Appellees respectfully submit that appellants are estopped to challenge the validity of the Illinois Land Title Registration Act and that the judgment of the Supreme Court of Illinois must for that reason be affirmed. Appellants voluntarily accepted the benefits of this elective statute and cannot now challenge its validity. By their petition in the circuit court of Cook County they invoked the provisions of the statute in their behalf and will not in a court of review be heard to question its constitutionality. Furthermore, appellants suffered their loss because of their own negligence and not because of any provision of the statute. This court will not examine the statute to see if some other owner, under different circumstances, might be injured by it. (pp. 28-34, *infra.*)

III.

The Land Title Registration Act of Illinois does not contravene the Fourteenth Amendment to the Constitution of the United States, but it affords to the owner of registered land due process of law and equal protection of the law. Land title registration acts are now, and in principle have been for centuries, in effect all over the world, and authority to enact such legislation has always been recognized. The demand for a simpler, quicker, cheaper and safer method of transferring title to land justified the adoption of the Torrens system in Illinois. (pp. 35-61, *infra*.)

## ARGUMENT.

### I.

### THERE IS NO QUESTION PRESENTED ON THIS RECORD WHICH GIVES THIS COURT JURISDICTION AND SO THIS APPEAL MUST BE DISMISSED.

### A.

**Appellant Did Not Invoke the Fourteenth Amendment to the Federal Constitution in the Circuit Court of Cook County Nor in the Supreme Court of Illinois and Cannot Challenge the Validity of the Illinois Statute in the First Instance in This Court on the Ground That It Contravenes the Fourteenth Amendment.**

The Fourteenth Amendment to the Federal Constitution is nowhere mentioned in the opinion of the Supreme Court of Illinois. There was nothing *inadvertent* about the mention of the *Fifth* Amendment and the omission to mention the *Fourteenth* Amendment. It was an exact statement of the fact. Appellants had not mentioned the Fourteenth Amendment in their principal brief filed in the Supreme Court of Illinois.

Counsel admit this fact, but they say that the Fourteenth Amendment was invoked in their reply brief and in their petition for rehearing. The fact that a rehearing was granted and that the court upon a reconsideration of the case adhered to its original opinion (R. 17) emphasizes the fact that the Supreme Court of Illinois refused to consider the contention that the act contravened the Fourteenth Amendment to the Federal Constitution for the reason that its Rule 15 provides that no point made for the first time in a reply brief or in a petition for rehearing will be considered.

In refusing to pass upon the point made by appellants *as an afterthought,* the Supreme Court of Illinois followed a long-established practice. By a long line of decisions, of which we cite only a few, the following rules are thoroughly established:

(1) Points relied upon for reversal must be raised in the appellant's original brief and argument to enable opposing counsel to be heard thereon and cannot be considered when raised for the first time in the reply brief.

*Indiana Insurance Co.* v. *People,* 170 Ill. 474;

*Harrow* v. *Grogan,* 219 Ill. 288;

*Pirola* v. *Turner Co.* 238 Ill. 210.

(2) Points raised for the first time in a petition for rehearing will be disregarded.

*Ellis* v. *Sisson,* 96 Ill. 105, 124;

*Matthews* v. *Granger,* 196 Ill. 164, 170;

*Arkley* v. *Niblack,* 272 Ill. 356;

*Scott* v. *Scott,* 307 Ill. 586.

Appellants, in their principal brief in the Supreme Court of Illinois, argued that the Illinois Land Title Registration Act, if construed as it has been construed by the Supreme Court of Illinois, violated the *Fifth* Amendment to the Federal Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law. R. 22; appendix, p. 72, *infra.*

> "It has been so frequently held, as not to warrant a citation of many authorities, that the first ten amendments to the Federal Constitution operate on the national government only, and were not intended to, and did not, limit the powers of the states in respect to their own people. (*Spies* v. *Illinois,* 123 U. S. 131; *Brown* v. *New Jersey,* 175 U. S. 172.) That

portion of the Fifth Amendment already cited, therefore, has no application in a proceeding like this, in a state court, under a state statute."

*Jack* v. *Kansas,* 199 U. S. 372.

The *only constitutional* question properly presented by the appellants to the Supreme Court of Illinois was that the Illinois Land Title Registration Act contravenes section 2 of article II. of the Constitution of Illinois.

In such a case the rule is as held by this court in *Bowe* v. *Scott,* 233 U. S. 658:

> "Where the state Constitution contains a due process of law clause, an averment that contemplated action of a municipality would deprive complainant of his property without due process of law, without making reference to the Constitution of the United States or asserting express rights thereunder, is referable to the state Constitution alone and affords no basis for invoking the jurisdiction of this court under section 237, Judicial Code."

The construction given the statute in question by the Supreme Court of Illinois is binding upon this court. This includes not only what the act means but that it does not violate the state Constitution.

*Barbee* v. *Chelan Electric Co.* decided Nov. 25, 1929, by this Court (Co-op. Adv. Sheet, 1929 Term, p. 90).

*Bachtel* v. *Wilson,* 204 U. S. 36;

*Smiley* v. *Kansas,* 196 U. S. 447.

This court's review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. Where the only Federal question presented is whether the state statute violates the *Fifth* Amendment to the Federal

Constitution, the question is patently frivolous and the appeal should be dismissed.

*Silver* v. *Silver*, decided Nov. 25, 1929, by this Court (Co-op. Adv. Sheets, 1929 Term, p. 67).

B.

**The Judgment of the Supreme Court of Illinois Is Based on Grounds Which Do Not Involve the Decision of a Federal Question and So No Federal Question Is Presented for Review. (R. 22.)**

The Supreme Court of Illinois held that appellants were estopped to question the constitutionality of the Illinois Land Title Registration Act because they had accepted the benefits of the act and had invoked the provisions of the act by filing their petition under it. (R. 22.) The court also held that "appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute." R. 25.

A case precisely in point is *Pierce* v. *Somerset Railway*, 171 U. S. 641, where this court, on page 648, said:

> "It is thus seen that there were two questions determined by the state court. One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such a case a writ of error to the state court cannot be sustained. *Eustis* v. *Bolles*, 150 U. S. 361; *Rutland Railroad* v. *Central Vermont Railroad*, 159 U. S. 630; *Seneca Nation* v. *Christy*, 162 U. S. 283.

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.

"In the above case of *Eustis* v. *Bolles*, 150 U. S. 361, 368, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. This court held that whether that view of the case was sound or not, it was not a Federal question, and therefore not within the province of this court to inquire about.

* * * * *

"In *Seneca Nation* v. *Christy*, 162 U. S. 283, it was held by the state court that even if there were a right of recovery on the part of the plaintiffs in error because the grant of 1826 was in contravention of the Constitution of the United States (which the court held was not the case), yet that such recovery was barred by the New York statute of limitations. This court held that as the judgment of the state court could be maintained upon the latter ground, it was without juirsdiction because the decision of the state court upon that ground involved no Federal question.

"In this case there being two distinct grounds upon which the judgment of the state court was based, each of which is sufficient, and one of which involves no Federal question, we must, upon the authority of the cases above cited, hold that this court is without jurisdiction, and the writ of error must be

*Dismissed.*"

See also *McCoy* v. *Shaw*, 277 U. S. 302.

## II.

## APPELLANTS ARE ESTOPPED TO CHALLENGE THE VALIDITY OF THE ILLINOIS STATUTE AND SO THE JUDGMENT MUST BE AFFIRMED.

### C.

### Appellants Accepted the Benefits of This Elective Statute and Cannot Now Challenge Its Validity.

Appellants acquired their title under the act, thereby saving the time and expense incident to private investigation of title. They held the land for a number of years and when they entered into a contract to sell it they agreed to give a Torrens certificate of title to the purchaser. (R. 10.) The Supreme Court of Illinois held that appellants were bound by the covenant that ran with the land, as provided in section 46 of the act. (R. 22-23.) It is clear that appellants elected to be bound by the act and that they are bound by it. This court is bound by the holding of the Supreme Court of Illinois that appellants were bound by the covenant that ran with the land, since a construction of the act is involved.

In *Booth Fisheries Co.* v. *Industrial Com.* 271 U. S. 208, this court held:

> "The Wisconsin Workmen's Compensation Act, which makes the findings of fact of the Industrial Commission conclusive if there be any evidence to support them, does not thereby violate the rights of an employer under the Fourteenth Amendment by depriving him of a judicial review of the facts on which an award is made against him, because the act is elective and does not bind an employer who has not voluntarily accepted its provisions."
>
> "An employer who has made such election, ac-

cepting the burdens, is estopped from questioning its constitutionality."

In *Pierce Oil Corporation* v. *Phoenix Refining Co.* 259 U. S. 125, this court held:

"Action of a state requiring a foreign corporation to operate its local, private oil pipe line as a common carrier does not deprive it of property without due process of law when done pursuant to constitutional and statutory provisions in force when the corporation entered the state and by it accepted in applying for and obtaining the privilege of doing local business."

On page 128 the court said:

"When the large discretion which the State had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered, (*National Council U. A. M.* v. *State Council,* 203 U. S. 151, 163; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 66; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 83,) the contention that this order, of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law must be pronounced futile to the point almost of being frivolous. 'By accepting the privilege it voluntarily consented to be bound by the conditions attached to it (216 U. S. 56, 66), and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional. A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the *Pipe Line* cases, 234 U. S. 548, 561, in a single sentence, saying: 'So far as the statute contemplates future pipe lines and prescribes conditions upon which they may be established, there can be no doubt that it is valid.'

"There is nothing in the nature of such a consti-

tutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. *Pierce* v. *Somerset Railway*, 171 U. S. 641, 648; *Wall* v. *Parrot Silver & Copper Co.* 244 U. S. 407, 411."

In *St. Louis Malleable Casting Co.* v. *Prendergast Construction Co.* 260 U. S. 469, this court held:

"An owner of property within a special sewer district, who connected his premises with the sewer when constructed and availed himself of its benefits, is estopped from maintaining a suit in which, upon the ground that the manner of constituting the district and apportioning the cost infringed his rights under the Fourteenth Amendment, he seeks to cancel the tax bill issued to the contractor against his property."

In *Grand Rapids and Indiana Railway Co.* v. *Osborn*, 193 U. S. 17, this court held:

"Purchasers of a railroad, not having any right to demand to be incorporated under the laws of a state, but voluntarily accepting the privileges and benefits of an incorporation law, are bound by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporation."

See also:

*Scholey* v. *Rew*, 23 Wall. 331;

*Palumbo* v. *George A. Fuller Co.* 99 Conn. 353, 122 Atl. 63.

If we are correct in our contention that appellants have, by accepting the benefits of this elective act, waived their right to challenge its validity, then the judgment of the Supreme Court of Illinois should be affirmed.

## D.

**By Their Petition in the Circuit Court, Appellants Invoked the Provisions of the Statute and Will Not Now Be Heard to Question Its Validity.**

We have set forth in our statement the allegations of the petition filed by appellants pursuant to sections 93 and 94 of the act in question. By this proceeding the appellants asked the circuit court of Cook County to coerce the registrar of titles to do what they asserted it was his duty to do under the Illinois Land Title Registration Act. That a litigant cannot institute proceedings under a statute and subsequently assert that it is invalid is well settled by the decisions of this court.

In *Wall* v. *Parrot Silver & Copper Co.* 244 U. S. 407, the appellants filed a bill in the United States District Court of Montana, "seeking to avoid an executed sale of all the property and assets of" the Parrot Silver & Copper Company to the Anaconda Copper Mining Company had pursuant to certain statutes. It was claimed that these statutes of Montana which authorized a sale of all the property of a corporation upon a vote of at least two-thirds of all the shares of the capital stock outstanding, were unconstitutional, and that if enforced appellants' property would be taken without due process of law, etc. A fraudulent scheme was also alleged. However, the statutes complained of also provided that any stockholder not satisfied with the award of appraisers appointed thereunder might appeal to the (State) District Court, where the value of the stock should be reassessed by a jury as in "appeals from the assessment of commissioners in condemnation proceedings provided by law." It appeared that "after the sale to the Ana-

conda Company complained of, the appellants served a notice of dissent on the Parrot corporation and commenced a statutory proceeding for the appraisal of their stock, which has not been brought on for hearing but is still pending."

Concerning the contentions of appellants that the statutes were unconstitutional, this court said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other states and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. (*Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581; *Electric Co.* v. *Dow*, 166 U. S. 489; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Leonard* v. *Vicksburg, Shreveport & Pacific R. R. Co.* 198 U. S. 416, 422.) They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

See also:

*United Fuel Gas Co.* v. *Railroad Com.* 278 U. S. 300;

*Hurley* v. *Commission of Fisheries of Virginia*, 257 U. S. 223;

*Chicago-Sandoval Coal Co.* v. *Industrial Com.* 301 Ill. 389;

*Shoal Creek Coal Co.* v. *Industrial Com.* 300 Ill. 551.

In *Lewis* v. *Chamberlain*, 69 Ore. 476, 139 Pac. 571, a case that arose under the Oregon Torrens act, the court said:

"The parties to this suit, having invoked the pro-

visions of the registration law, cannot now be heard to say that it is unconstitutional."

If this point made by us is well taken, the judgment of the Supreme Court must be affirmed.

## E.

**Appellants Suffered Their Loss Because of Their Own Negligence and Not Because of Any Provision of the Statute. This Court Will Not Examine the Statute to See If Some Other Owner, Under Different Circumstances, Might Be Injured By It.**

In its opinion the Supreme Court of Illinois stated one of its grounds of decision thus:

> "After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with, it would have been impossible for Napletone to have accomplished this fraud. The act erected a safeguard against a forged transfer being registered by the requirement that no transfer should be registered unless the owner's certificate was produced along with the instrument of transfer." R. 23.

And again:

> "Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute." R. 25.

In other words, the court holds that appellants are estopped to complain of their loss, if any, because they themselves intrusted Napletone with their duplicate certificate of title and with the duplicate original of their contract with the Kennedys. They cannot complain because of the principle that where one of two innocent persons must suffer by the fraud of a third person, he

who put it in the power of the third person to perpetrate the fraud must bear the loss.

Since this non-Federal ground of estoppel amply sustains the judgment of the Supreme Court of Illinois, this court should affirm that judgment.

The principle relied on by us is well stated in *Eustis* v. *Bolles,* 150 U. S. 361, at 366, as follows:

> "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

The principle has been applied in scores of decisions. We cite only a few of them.

*Harrison* v. *Morton,* 171 U. S. 38;

*Capital National Bank* v. *First National Bank,* 172 U. S. 425;

*McQuade* v. *Trenton,* 172 U. S. 636.

If this point is sustained, there is no occasion for investigating the constitutional question because the state courts were right in denying equitable relief to one who had suffered a loss by his own negligence and not by reason of any provision of the act.

## III.

## THE LAND TITLE REGISTRATION ACT OF ILLINOIS DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

### F.

**The Demand for a Simpler, Quicker, Cheaper and Safer Method of Transferring Title to Land Justified the Enactment of the Land Title Registration Act in Illinois. It Affords the Owner of Registered Land Due Process of Law.**

Even if we assume in this division of the argument,

(a) That appellants predicated their right to relief in the state courts on the due process clause of the Fourteenth Amendment;

(b) That the state Supreme Court based its judgment solely upon the ground that the Illinois act did not deprive appellants of their property without due process of law; and

(c) That neither the filing of the petition under sections 93 and 94 of the Illinois statute, nor the purchase of land subject to it, estops the appellants from attacking it here;

yet the judgment of the Supreme Court of Illinois must be affirmed for the reason that the Illinois statute afforded appellants due process of law.

Before proceeding with this division of the argument, we must first determine its *scope*, which depends upon the parts of the act that may legitimately be attacked by the appellants in view of the assumptions above stated. Manifestly, they cannot attack that part of the

act that relates to *initial* registration of title to land because they do not belong to the class that is affected by it. They expressly allege in their petition that initial registration of the land in controversy was duly and regularly accomplished upon the application of other persons, that thereafter, "by mesne and sundry conveyances", the title to said land became vested in appellants, and that a duplicate certificate of title was duly and regularly issued to them by the registrar of titles, all, of course, as provided by the act. R. 1-2.

It is obvious that appellants claim under the original decree of registration, which depends, *solely* and *exclusively,* upon the Illinois Land Title Registration Act. It necessarily follows, therefore, that appellants' attack must be limited to those parts of the act that prescribe (1) by what means registered lands may be conveyed, and (2) how title to them may otherwise be lost or acquired.

We must, therefore, make the following assumptions:

(1) That, in addition to the ordinary recording statutes that provide for the *recording* of mere *evidences* of title, the laws of Illinois provide for the *registration* of *title* to land, and that they are valid so far as *initial* registration is concerned; and

(2) That appellants *voluntarily* acquired an ordinary piece of land, title to which had been registered initially by other persons; that *title* to the land was duly and regularly registered in the appellants, and that a duplicate certificate of title was delivered to them as provided by law.

Now, having in mind (1) the foregoing necessary assumptions, (2) the pertinent provisions of the Torrens

Act, and (3) the facts alleged by appellants, let us put the *concrete question* that is presented in this case.

*Were appellants deprived of their property without due process of law?*

The fact that there existed in Illinois two different classes of land,—registered and unregistered,—not only justified, but required different legal rules concerning their transfer, the legal effect of transfers, etc. (*Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.) Manifestly, registered lands could not be conveyed or encumbered by private acts of the parties without reference to the public register. Initial registration would be of no practical benefit to anyone except the person who procured it, if registered land could be conveyed, encumbered, etc. like unregistered land. The relatively expensive slow process of initial registration could not be repeated every time there was a change of ownership.

The purpose of the General Assembly was to provide a safe, expeditious and inexpensive means of ascertaining with certainty the condition of the title to registered land at any given time, so that it might be transferred or otherwise dealt with in absolute assurance, safety and dispatch by all persons concerned. It therefore provided that title to registered land should be conveyed not by deed, but by registration of title in the office of the registrar of titles. There is nothing unconstitutional—to say nothing of adaptation to proposed ends or reasonableness—in that. From time immemorial, or at least since states have permitted their subjects to own or convey land, the laws have provided what was necessary to the transfer of title from one person to another. There is nothing unreasonable nor unconstitutional in making the registrar of titles the one whose duty it is to keep all records, to make all entries, to issue certificates of

title, to determine whether the transferor can legally convey the lands, to determine whether the proposed transfer conform with the law, etc.

Contrary to appellants' argument (Point A), a reading of the act shows:

(1) That provision is made for a hearing before the registrar [who is provided with examiners of title who must be attorneys at law (sec. 5),] whenever any transfer is to be made, and that the registrar is given undefined but nevertheless broad discretionary powers subject to proceedings for correction by the circuit court (secs. 93-95), as well as other remedies. Section 47 provides that it must be made apparent to the registrar that the transferor owns or has the right to convey and that the transferee has the right to have a conveyance; and

(2) That an owner is given ample means of protection and can always obtain a hearing by holding on to his duplicate certificate of title.

*All that any owner has to do to obtain a hearing before the registrar is to retain possession of his duplicate certificate of title.* There is nothing unusual in requiring the owner to hold on to his duplicate certificate of title, particularly when the act provides means for his protection if it should be lost (Sec. 58.) Owners of negotiable instruments and certificates of stock, which are transferable by mere delivery, must bear the same burden.

Appellants *voluntarily surrendered* their duplicate certificate of title to Napletone and, as we have seen, are responsible for their own loss. They suggest that they would be in the same position if their duplicate certificate

of title had been stolen. The answer to the suggestion is that it was not stolen and this court is not going to decide the validity of a state statute upon a hypothetical case.

In *Hibben* v. *Smith*, 191 U. S. 310, the court held:

> In the apportionment of assessments for improvements due process of law is afforded to the taxpayer if he is given an opportunity to be heard before the body making the assessment; and, so far as the Federal Constitution is concerned, the state legislature may provide that such hearing shall be conclusive.

On pages 321-2, the court said:

> "Although in imposing such assessments, the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law in order to give validity to such assessment. Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 168, it was said that—

> 'Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one provided by the statute.'

And it was also said in that case that whether a review is or is not given upon any of these questions of fact (that is, as to benefits and the amounts of the assessments), was a mere question of legislative discretion, so long as the tribunal created by the

state had power to decide them, and the opportunity for a hearing was given by the act, and that it was not constitutionally necessary in such case to give a rehearing or an appeal.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, where the law provided for the fixing of water rates by a board of supervisors after a hearing, and without any right of review by any court, it was stated (at page 354) by Mr. Chief Justice Waite, giving the opinion of the court:

'Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule.' See *Spencer* v. *Merchant*, 125 U. S. 345."

See also:

*Pittsburgh, etc. Railway* v. *Board of Public Works*, 172 U. S. 32, 45;

*Den* v. *The Hoboken Land and Improvement Co.*, 18 How. 272, 280.

Laws relating to the transfer of land depend upon the police power of a state. The transfer and the security of titles to land vitally affect the public welfare. Opportunity for a hearing must be such as the particular case admits of or requires. Titles must be secure, and yet readily transferable. If the act had required the personal presence of an owner in the registrar's office whenever a transfer should be made, it would have been too rigorous. Modern business is more flexible than that. A hardship would have been imposed upon non-residents, aged, infirm, sick, temporarily absent, and other citizens. A broad discretion was given the registrar, and the owner was given ample means of protection, not only by providing that the surrender of his duplicate

certificate should be a condition precedent to the making of a transfer, but by providing ample indemnity in case he should be deprived of his property by reason of any mistake or fraud.

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."
>
> *United States* v. *Fox*, 94 U. S. 315;
>
> *Arndt* v. *Grigg*, 134 U. S. 316.

Appellants' Point B of argument is answered by calling attention to the fact that neither section 40 nor 42, nor any other section of the act, purports to take the property of one person and give it to another. The provision for paying indemnity to one who has suffered loss by reason of some provision of the act or some act or omission of the registrar is not a provision for compensation for property taken but a new remedy substituted for others taken away.

The Torrens system of land title registration is at one and the same time a system of conveyancing and a system of title assurance. In discussing the assurance or indemnity features of the Colorado Land Title Registration Act, the Supreme Court, in *White* v. *Ainsworth*, 62 Colo. 513, 163 Pac. 959, said:

> "We are unable to appreciate wherein these provisions make the state an insurer of title. The act provides a remedy for mistake committed by the governmental officers and also against other parties, but in such instance it only agrees to pay upon the

happening of any of the events mentioned in the sections, and then only out of a certain fund, which is created by a payment to the registrar by each person registering title to land. *It is not intended for the insurance of land titles nor as compensation for land taken without the owner's consent, but merely as a safeguard or protection to that extent in favor of anyone who might perchance be injured without other remedy by reason of the provisions of the act.* It is quite probable, although unnecessary to determine that the law could stand even though this indemnity fund were eliminated and no provisions made for any such suit by claimants of this kind." (Italics ours.)

See also in this connection:

*Jones* v. *York County,* 26 Fed. (2nd), 623;

*Shevlin-Mathieu Lumber Co.* v. *Fogarty,* 130 Minn. 456, 153 N. W. 871;

*Ashton-Jenkins Co.* v. *Bramel,* 56 Utah, 587, 11 A. L. R. 752.

In *Miedreich* v. *Lauenstein,* 232 U. S. 236, the court held:

(1) In the absence of fraud or collusion, where the original party did all that the law required in the issue and attempt to serve process, but the sheriff made a false return to the effect that service had been made, the state court, in the absence of direct attack upon the return, in acting thereon as though it were true, and holding that the sole remedy was an action against the sheriff for a false return, did not deny the party due process of law within the meaning of the Fourteenth Amendment.

(2) One damaged by reason of a false return of the sheriff as to service of process, and who is given a remedy against the sheriff, is not denied due process of law by the enforcement of the judgment based on such false return because the amount of the sheriff's bond is less than the amount of his loss.

On page 247 the court said:

> "In a case of this character the law must have in view, not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved. Were the law otherwise, titles might be attacked many years after they were acquired, where the party had been guilty of no fraud and had acted upon the faith of judicial proceedings apparently perfect in every respect."

The foregoing argument will also suffice for that part of the act that provides that purchasers for value in good faith from a registered owner shall acquire a good title. It does not protect dishonest persons, and the true owner is given means of securing a hearing before the registrar by simply safely keeping his duplicate certificate of title, or of promptly notifying the registrar of its loss and taking the other steps provided by law. If the foregoing and other means of protection provided by the act are availed of, no owner's land can be transferred to another person without the owner's consent.

See Kerr's Australian Land Titles System, p. 165, *et seq.*

It is not only fair to all concerned, but essential to the system, that the public records shall be given full faith and credit, and that purchasers for value without notice from a registered owner shall be protected.

> "This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law and, by construction, make it not the Torrens system of land

titles, but a mere change in the form of the record, a mere modification of the recording act."

*Brace* v. *Superior Land Co.*, 65 Wash. 681, 118 Pac. 910;

*McMullen & Co.* v. *Croft*, 96 Wash. 275, 164 Pac. 930.

There is certainly nothing arbitrary, or oppressive, or unjust, in the protection of purchasers for value without notice as against an owner to whom the law has afforded ample means of protecting himself. They are similarly protected under the ordinary recording acts. In fact, they are protected in numerous cases, because of compensating public benefit, where the true owner is without fault. As Salmond points out, there are exceptions to the rule, *Nemo plus juris ad alium transferre potest, quam ipse haberet.*

"These exceptions are of two kinds: (1) those due to the separation of ownership from possession. We have seen already that when the legal ownership is in one man and the equitable in another, the legal owner is a trustee for the equitable. He holds the property on behalf of that other, and not for himself; and the obligation of this trusteeship is an encumbrance upon his title. Yet he may, none the less, give an unencumbered title to a third person, provided that that person gives value for what he gets, and has at the time no knowledge of the existence of the trust. This rule is known as the equitable doctrine of purchase for value without notice. No man who ignorantly and honestly purchases a defective legal title can be affected by any adverse equitable title vested in any one else. To this extent a legal owner can transfer to another more than he has himself, notwithstanding the maxim, *Nemo dat qui non habet.*

"The second class of exceptions to the general principle includes the cases in which the possession of a thing is in one person and the ownership of it in another. Partly by the common law, and partly

by various modern statutes, the possessor is in certain cases enabled to give a good title to one who deals with him in good faith believing him to be the owner. The law allows men in these cases to act on the presumption that the possessor of a thing is the owner of it; and he who honestly acts on this presumption will acquire a valid title in all events. The most notable example is the case of negotiable instruments. The possessor of a bank-note may have no title to it; he may have found it or stolen it; but he can give a good title to any one who takes it from him for value and in good faith. Similarly mercantile agents, in possession of goods belonging to their principals, can effectively transfer the ownership of them, whether they are authorized thereto or not." Jurisprudence (6th ed.), pp. 414-5.

And the usual recording acts do not furnish absolute protection to an owner of real estate. If B buys a farm from A, and by the negligence of himself or the recorder of deeds his deed is not placed on record, C can get a good title from A if he purchases the farm without notice, actual or constructive, of B's title. This does not render the recording act void on the ground that it is a taking of B's property without due process of law. B would lose his property by reason of his failure to safeguard his interests and not by reason of any defect in the statute. That is the situation in the case at bar. R. 25.

Sections 40 and 42 of the Land Titles act are analogous to a statute of limitations. For instance, if a person is in the actual, exclusive, hostile, and notorious possession of lands for twenty years in Illinois, and for less periods in other states, his title is just as good as if he had an unbroken chain of title from the government; and one who was disseised however wrongfully has not by this statute been deprived of his property without due process of law. Furthermore, if the disseisee is in possession under color of title and has paid

taxes for a certain number of years—seven in Illinois—his title is unassailable. The Supreme Court of Illinois has held this limitation act constitutional. (*Steele* v. *Gellatly*, 41 Ill. 39.)

In other words, the law, for reasons of policy, must often choose who shall suffer injustice. And in their incidence *all* laws necessarily involve occasional injustice. But there is nothing inherently unjust in a law that first provides an owner with ample means of self-protection and then protects purchasers for value without notice where the owner has failed to avail himself of those means.

In denying the owner relief as against purchasers for value without notice from a fraudulent registered owner, the act has merely assimilated immovables to movables and applied doctrines which certainly are not alien to the common law. This is in line with the evolution of civil law from immovable to movable property.

See 3 Evolution of Law Series (Kocourek and Wigmore), pp. 658-60; (The Evolution of Civil Law, by Raoul DE LA Grasserie, sec. 29), where it is said:

> "Today a third stage appears. Movable property has in turn acted upon immovables. These are becoming as movable as the former. Their transmission is as simple; the tendency is to merge the two classes. * * * The end of the evolution is a complete assimilation of the two forms of wealth except for those differences which may survive in the case of certain movables by reason of the impossibility of fixing them even momentarily."

As Holdsworth points out:

> "* * * one of the chief reasons why the law as to the seisin and disseisin of hereditaments tended to fall apart from the law as to the possession and dispossession of chattels, was the fact that the first

was moulded by the real and second by the personal actions."

7 Holdsworth's History of English Law, pp. 80-1.

See also Maine, Early Law and Custom, p. 389.

There is no reason now why immovables should not be as expeditiously, cheaply and safely transferred as movables. Long ago in Illinois, livery of seisin and possession of land were declared to be unnecessary to a valid conveyance. Deeds are no longer effective so far as registered land is concerned. And possession of a duplicate certificate of title is now as important as possession of bank-notes, or the possession of land was in Bracton's time.

Take, for example, the case of an owner who has voluntarily intrusted his duplicate certificate of title to another, who fraudulently procured title to be registered in himself. His case is far better than that of one who formerly intrusted chattels to another, who subsequently parted with them. A *gift* by the perpetrator of the fraud will not prevent the recovery of the land. Nothing but a transfer for value without notice can do that, regardless *of how many times* it may be transferred.

*Gibbs* v. *Messer* (1891) A. C. 248, 60 L. J. P. C. 20;

*Brown* v. *Broughton* (1915) 8 W. W. R. 889, 31 W. L. R. 583, 25 Man. R. 489.

Not so, formerly, with the owner of chattels.

In *Holmes' The Common Law*, p. 169, we read:

"We find it laid down in the Year Books that, if I deliver goods to a bailee to keep for me, and he sells or gives them to a stranger, the property is vested in the stranger by the gift, and I cannot

maintain trespass against him; but that I have a good remedy against the bailee by writ of detinue (for his failure to return the goods). These cases have been understood, and it would seem on the whole rightly, not merely to deny trespass to the bailor, but any action whatever. Modern writers have added, however, the characteristically modern qualification, that the purchase must be *bona fide*, and without notice. It may be answered, that the proposition extends to gifts as well as to sales by the bailee, that there is no such condition in the old books, and that it is contrary to the spirit of the strict doctrines of the common law to read it in."

See also:

2 Pollock & Maitland, History of English Law, p. 153, *et seq.*

2 Holdsworth's History of English Law, p. 78, *et seq.*

In other words, one who entrusts a duplicate certificate of title to another is in the same position as one who entrusts money, or negotiable instruments or certificates of stock transferable by mere delivery, to another, and on familiar principles of common law, softened as a matter of grace. There exists no constitutional reason why a State may not provide that this shall be so.

It is said in 2 Pollock & Maitland, History of English Law (p. 95):

"* * * if one is put into seisin by the judgment of a court one is protected by the court's ban. A short term, in general a year and day, is given to adverse claimants for asserting their rights; if they allow that to elapse and can offer no reasonable excuse for their inertness, such as infancy or absence, they are precluded from action; they must forever after hold their peace, or, at all events, they will find that in their action some enormous advantage will be allowed to the defendant, as, for example, that of proving his case by his own unsupported

> oath. When Bracton charges with negligence and 'taciturnity' all those persons living in England who are silent while the land upon which they have claims is being dealt with by the King's court, this may look absurd enough, for how is a man in Northumberland to know of all the collusive suits that are proceeding at Westminster? But the courts of old times had been local courts; the freeholders of the district had been bound to attend them; and to the man who alleged that he was not at the moot when his land was adjudged to another, there was this reply—'But it was your duty to be there.'"

The act in the case at bar certainly is analogous. It says to the owner, *"Hold on to your duplicate certificate of title; no transfer of title can be made without its surrender. You may recover back your land from a wrongful 'disseisor' no matter how long he may hold it.* You *may also recover it from any feoffee of the wrongful disseisor,* EXCEPT *a purchaser for value without notice."*

And to the owner who alleges that he was not before the registrar of titles when his land was registered in another, there is the reply, "But it was your duty to be there." To insure his being called before the registrar all that he need do is to safely keep his duplicate certificate of title. *It is his duty to keep it.*

In Powell on Land Registration, Sec. 213, p. 178, it is said:

> "Likewise, public policy, expediency, and the need of repose and certainty as to land titles demand that the *bona fide* purchaser of a certificate of title to registered land, who, though he buys on a forged transfer, succeeds in having the land registered in his name, should nevertheless hold an unimpeachable title. There is more natural justice in recognizing his title as being valid than there is in recognizing as valid the title of one who has succeeded in ripening a forged color of title by prescription.

*"In the first place, a forger cannot effectuate his forgery in the case of registered land by executing a transfer which can be registered, unless the owner has allowed him, in some way, to get possession of the owner's certificate. The act has erected in favor of the owner, as a safeguard, against a forged transfer being perpetrated against him, the requirement that no voluntary transfer shall be registered unless the owner's certificate is produced along with the instrument of transfer.* Therefore, if the owner has voluntarily or carelessly allowed the forger to come into possession of his owner's certificate he is to be judged according to the maxim, that when one of two innocent persons must suffer by the wrongful act of a third person the loss falls on him who put it into the power of that third person to perpetrate the wrong. Furthermore, even if the forger stole the owner's certificate, the owner is up against no greater hardship than is experienced by one whose money or negotiable paper payable to bearer is stolen and transferred by the thief to an innocent purchaser." (Italics ours.)

See also:

*American Land Co.* v. *Zeiss*, 219 U. S. 47, 68-9;

*Ballard* v. *Hunter*, 204 U. S. 241.

So far as this case is concerned, the Illinois statute merely prescribes (a) how (registered) land shall be conveyed, and (b) a limitation on actions for the recovery of land by a 'disseisee.' The common law abounds with such statutes.

3 Holdsworth's History of English Law, pp. 9-10;

7 id. 50-51;

2 Pollock & Maitland, History of English Law, pp. 49-51;

*Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, 813, 815-816.

Making a Torrens certificate conclusive evidence of title is not a new idea in American jurisprudence. It is merely an extension of the doctrine of estoppel which was given effect by our courts under the recording laws long before the Torrens system was known in America. Speaking of recording statutes, the United States Circuit Court of Appeals for the Eighth Circuit has said (Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301, (Ark.):

> "It is the purpose and the legal effect of these statutes to make the title that appears of record—the record title—superior in the hands of an innocent purchaser for value to the real title that is withheld from registration. Hence, while one who has parted with his title to land by an unrecorded deed or decree has no title or interest remaining in himself, yet his deed to an innocent purchaser for value, by virtue of the registry statutes, avoids the effect of the prior unrecorded deed or decree, and vests the title to the land in the subsequent purchaser to the same extent as it would have done if the title of record had been the real title. The holders of unrecorded instruments are estopped by the statute and their negligence from denying that the record title is the real title."

In Kennedy *v.* Northup [1853], 15 Ill. 148, at 155, the Supreme Court of Illinois said:

> "In the case of Powers v. McFarren, 2 Serg. & Raw. 44, the supreme court of Pennsylvania held, under a statute like ours, that a deed from the heir should prevail over the unrecorded

deed from the ancestor, and they place it upon the broad ground that the expression 'subsequent purchasers' means subsequent purchasers from the heir as well as from the original grantor himself. After much reflection, I am satisfied that this is the true and proper construction of the statute. It meets the objects designed to be accomplished by the law, and is within the reason which gave rise to the enactment. It was the object of the legislature to make potent the titles to real estate, that purchasers might know what title they were acquiring. Where a deed is not recorded, the title is apparently still in the grantor, and the law authorizes purchasers who are ignorant of the conveyance to deal with him as the real owner. In case of his death, the heir becomes the apparent owner of the legal title; and it is equally important and equally as just that the public may be allowed to deal with him as with the original grantor, if living. This, it is true, can not with propriety be always permitted without cutting off devisees, and perhaps creditors. A will may be valid and convey the legal title to the devisee, although it may not be probated and recorded, or even known to exist for a long time, but when discovered the devisee may assert his legal title under it to the exclusion of the grantee of the heir who was the apparent legal owner, and so may creditors assert their claims within a certain time, and whoever purchases of the heir must take his conveyance subject to be thus defeated. This is no doubt an evil, which were it practicable and compatible with justice, it would be desirable to remedy. But because the statute could not be framed or

cannot be so construed as to meet every contingency, it is no reason why it may not accomplish the object of its enactment as far as that may be justly done. There is as much justice in protecting the purchaser from the heir as from the ancestor; and because this may not be done in every case, it is no reason why it shall not in any. It is true that neither the heir nor devisee could hold the title against the unrecorded deed, nor could the grantee in a voluntary deed. And yet the grantee in a subsequent conveyance may hold the title, if he purchases in good faith and for a valuable consideration, and his deed is first recorded; so that the fact that the apparent legal owner may not hold against the unrecorded deed does not prove that he may not convey to another who may hold against such deed. *When the title once vests in or passes through meritorious hands, it becomes purified, and is as valid and effectual as if it had never been exceptionable.* Although the heir himself might not prevail against this unrecorded deed, it does not follow that he may not convey to one who may prevail."

And the foregoing brings us to a criterion that has often been applied by this court.

## G.

**The Power of the State to Legislate with Respect to Land Titles and to Declare by Law What Shall Constitute an Indefeasible Title Has Long Been Recognized. Land Title Registration Acts Similar to the Illinois Statute Are Now in Effect Throughout the World and Have Been Sustained by the Courts of Many Jurisdictions.**

As we have seen (*supra*, p. 12) land title registration acts are no longer new. Those acts which derive from the Real Property Act of South Australia, which has been in operation since 1858, have been recognized as valid legislation by this court, by the Supreme Courts of sixteen states of the United States, by the highest courts of scores of jurisdictions of the British Empire, and by the courts of other jurisdictions. In *Block* v. *Hirsch*, 256 U. S. 135, at 158, this court said:

> "It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile or has no reasonable relation to the relief sought."

In *Cunnius* v. *Reading School District*, 198 U. S. 458, it was contended that the State of Pennsylvania was without power to provide for the administration of the property of an absentee, also that the method of procedure authorized by the statute was so lacking in notice as not to constitute due process of law. The court, after pointing out that the "question was, not the wisdom of the statute, but whether it was so beyond the scope of municipal government to provide for the administration of the estate of absentees under the condi-

tions enumerated in the Pennsylvania law [absence for seven years; notice by publication, etc.]," continued as follows:

> "We do not pause to demonstrate, by original reasoning, that the right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists. This is not done, because we propose rather to test the question by ascertaining how far such authority has been deemed a proper governmental attribute in all times and under all conditions. If it be found that an authority of that character has ever been treated as belonging to government and embraced in the right to protect and foster the well-being and order of society, it must follow that that which has at all times been conceded to be within the power of government, cannot, in reason, be said to be so beyond the scope of governmental authority that the exertion of such a power must me held to be a want of due process of law, even although there is no constitutional limitation affecting the exercise of the power."

The court then examined the Roman Law, and the laws of several states of Continental Europe. Finding that authority to provide for the administration of the property of an absentee had always been treated as belonging to government, the court upheld the statute.

The Torrens act merely provides (a) how titles to land may be registered, (b) how they shall be conveyed, and (c) the effect of registration. The Torrens act is, therefore, at once a statute of frauds, a statute of limitations and a recording statute.

All peoples, in all ages, have, by one means or another, specified what things shall be the subjects of ownership, who may own them, and upon what conditions. Private

property in land is a product of history, and a relatively recent one at that.

Wissler, The American Indian (2nd ed.) pp. 183-4;

Sumner and Keller, The Science of Society, vol. 1, pp. 247-350;

Lowie, Primitive Society, (12th ed.) pp. 204-56;

Hobhouse, Morals in Evolution (4th ed.) pp. 324-45;

Wissler, Man and Culture, pp. 242-3;

Vinogradoff, Historical Jurisprudence, vol. 1, pp. 321-2;

Brissaud, History of French Private Law, (Continental Legal Series, vol. 3, pp. 30-54.)

Wherever it has been recognized, the essentials of a valid conveyance, the effect thereof, and how title thereto may otherwise be lost or acquired, have universally been prescribed by law.

It is surprising indeed to hear it asserted that an act that prescribes how (registered) land shall be conveyed and a limitation upon an action for its recovery by a disseisee is beyond the competence of a state,—particularly one that derives its law from the common law of England, which does not recognize absolute ownership of land, but only *tenure*, and tenure in chivalry, by which the greatest part of the lands were once held, was subject to aids, relief, primer seisin, wardship, marriage, fines for alienation and escheat.

1 Pollock & Maitland, History of English Law, p. 288;

3 Kent's Commentaries (Lacy's ed.) *p. 506.

In view of the assize of novel disseisin, the many statutes of limitation, courtesy, dower, rules with respect to unfree tenures, the Statute of Quia Emptores, the Statute of Uses, the Statute of Enrolment, the Statute De Donis, the Statute of Frauds, the statutes making land liable for debt, the statutes against maintenance (which prohibited the conveyance of land adversely held by another), the statutes with respect to fraudulent conveyances, the rules against perpetuities and accumulations, and the many statutes pertaining to wills, to say nothing of the disabilities of aliens, women and minors, is there, *can* there be any doubt of the competence of the State of Illinois to pass the Torrens Act?

In the history of Anglo-American law, conveyances of estates or interests in land have assumed many different forms.

7 Holdsworth's History of English Law, pp. 353-4;

2 Pollock and Maitland, (op. cit.) p. 84 *et seq.*;

2 Vinogradoff, Historical Jurisprudence, p. 232.

Not only the forms of conveyances, but their legal effect, have been prescribed by law again and again. Holdsworth states that "in the Middle Ages the forms of conveyance at the disposal of the freeholder fell into two main classes—those which took effect by the act of the parties, and those which depended for their efficacy upon the machinery of the court. (Vol. 7, p. 353.) And there are three significant respects in which the Torrens act finds warrant in common law practices. First, in the publicity and certainty given to conveyances; second, in the efficacy given to conveyances by the machinery of courts; and third, in providing a record that may be consulted and relied on by all concerned.

In his Early Law and Customs, (p. 352 *et seq.*) Maine says that land title registration acts are in principle a reversion to primitive practices. He points out that even after land became private property the community retained large rights over it, and without its consent it could not be transferred. He refers to the land registries of the State of Hesse-Darmstadt and of the Swiss Canton of Zurich, and says that they have the highest commendation from juridical writers. These systems are very similar to the Torrens system of land title registration.

In the case of *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, Mr. Chief Justice Holmes pointed out the analogy between the proceedings for initial registration and a fine at common law, and also that what the registrar does he does as an officer of the court. (See secs. 15, 91, 93 and 94 of the Illinois Act.) If the registrar is not a hand of the court so far as transfers of registered land are concerned, then he is an administrative officer with power to pass upon certain matters, subject to the court's supervision. This affords due process of law as we have seen. And the title is made a matter of public record, and by authority of law concludes all concerned. This is sound common law practice. See

3 Holdsworth, (op. cit.) pp. 234-54;

1 Pollock and Maitland, (op. cit.) p. 630;

2 id. p. 89;

19 Green Bag, 338, quoting Bohun, Privilegia Londini;

4 Kent's Commentaries, *pp. 484-5.

The fundamental difference between a recording statute and the Torrens act is that the former deals with

*evidences* of title and the latter with *titles*. Standing alone, they differ in content, although both were motivated by the desire to insure security of titles and to expedite transfers. When, however, to recording statute are added the existing statute of frauds, the statute of limitations and the various actions for the recovery of land, quieting title, etc., there is no essential difference in content so far as the power of the state to legislate is concerned. When we borrowed from Australia registration of title we already had well-organized machinery to do the work.

In the Greek City-Commonwealths of the fourth and fifth centuries B. C., there was registration of documents concerning land tenure, constitution of dower, transfer of landed property and the establishment of mortgages and fiduciary sales.

2 Vinogradoff, Historical Jurisprudence, pp. 204, 216, 222, 237, 239, 259-63.

Professor Vinogradoff states that the officials superintending registration were not mere automatons. In many cases the validity of transactions depended upon confirmation by these officials. (Pp. 259-60, 203-4.)

In Rome, even before the XII. Tables, Servius Tullius provided for a register of the citizens (*census*) that contained, among other things, a list of their lands. This "*census*" assured, as far as possible, certainty of title, as it was declared that no transfers of property enrolled in it would be recognized unless made by public conveyance with observance of certain prescribed formalities."

23 Encyc. Brit. (13th ed.) p. 529.

The first attempt to introduce general registration of

conveyances in England was the Statute of Enrolments passed in the twenty-seventh year of Henry VIII.

16 Encyc. Brit. (13th ed.), p. 162, 164.

This statute provided that from the last day of July, 1536, no bargains and sales of estates of freehold should be valid, unless made in writing under seal, and enrolled within six months of the date of the deed in one of the King's courts of record at Westminster, or in the county where the lands were situate.

4 Holdsworth's History of English Law, pp. 450-61.

A comprehensive statute was subsequently passed in 1704.

2 and 3 Anne, c. 4.

It provided that all deeds, conveyances and wills should be registered in a public office created by the statute, which, however, applied only to the West Riding of the County of York, which was then an active center of the wool industry.

In 19 Green Bag, 335, there is an intensely interesting article by Professor Joseph H. Beale, Jr. on "The Origin of Recording Deeds in America." He states that the present Massachusetts act goes back with no substantial change to October 7, 1640. The earliest record on the books of the Plymouth Colony of a transfer of land is a deed in 1627, "which is not merely copied into the book, but was apparently written out for the first time on the book and there signed by the parties, the writing on the page being the actual deed itself." P. 336.

On April 1, 1634, the General Court of Massachusetts ordered a sort of colonial domesday book. It was provided that the constable and four of the chief inhabitants of every town, to be chosen by the freemen, with the ad-

vice of some one or more of the next assistants, should "make a survey of houses and lands and enter the same in a book with the several bounds and quantities by the next estimation

> " '& shall deliuer a transcript thereof into the Court within sixe monethes nowe nexte ensueing, & the same soe entered and recorded shal be a sufficient assurance to every such ffree inhabitant, his & theire heires and assignes, of such estate of inheritance, or as they shall have in any such howses, lands, or ffranke-tenements.' " (p. 337.)

Professor Beale pertinently remarks:

> "This provision, which practically made an entry in the book of possessions a guaranteed title of the land, seems to furnish the first indication of the present rule of priority." (p. 337.)

The necessity for an improved system of land title registration is pointed out in 17 Columbia Law Review, p. 354, where it is said:

> "The disadvantages of the recording system lie in the fearfully complicated state of the record title of land which is frequently conveyed or encumbered, and the constant liability of the owner to suits on both recorded and unrecorded claims. The purchaser of realty, to obtain even reasonable protection, must procure the services of a searcher to prepare an abstract of all the deeds, mortgages, *lis pendens*, and other documents affecting the property recorded in the county court-house for years back; and he must also procure an attorney's opinion on the validity of those instruments as affecting the legal status of the title; or he may accept the doubtful security of a warranty deed. Even the utmost precautions cannot assure him an indefeasible title; unsuspected claims, such as the dower right of unknown widows, may arise to cast a cloud upon it."

See also:

8 Columbia Law Review, 438, 442.

Thom, Canadian Torrens System, p. 6 *et seq.*, "Defects of 'Old Systems.' "

Then there is the *expense*. In 8 Columbia Law Review, 438, 442, it is said:

> "Most prominent, however, and absolutely fundamental as objections to such a system, are the expense and time required for re-examination of titles whenever they are passed or encumbered. These patent defects and inconveniences have called, again and again, for investigation and attempts at relief. Practical men have refused, and will always refuse, to believe that a title hundreds of years old must continue to be examined, either from its beginning or from an indefinite time in the past, over and over again, whenever it is transferred or encumbered."

This delay, expense and uncertainty not only affect real estate values, but constitute an economic burden which is repeated with every transfer, every mortgage, every lease of any importance, etc. In the aggregate this burden is stupendous.

This court on numerous occasions has recognized that a change in conditions not only justifies, but requires, legislation which under other circumstances might be held to be unconstitutional.

*Block* v. *Hirsh*, 256 U. S. 135;

*Hadacheck* v. *Sebastian*, 239 U. S. 394;

*Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365.

Of necessity "the new is never more than a slight ripple on the deep foundation of the old and established."

26 Goldenweiser, Early Civilization, p. 18.

Change is rarely possible until conditions have become almost intolerable, and relief, not inconvenience, is the ordinary consequence of modification of existing laws.

The private property marks of savage tribes, the pillars of stone in ancient Greece, *mancipatio, traditio et usucapio, in iure cessio,* feoffment with livery of seisin, the customs of public nams, proceedings in manorial courts, borough customs, fines, the exection, witnessing, acknowledgment and delivery of deeds, the Statute of Enrolments, the West Riding statute, the early ordinances in Plymouth colony and in the colony of Masachusetts, the modern recording statutes and other statutes above alluded to, the title registration acts which affect the most valuable lands on the globe, are all merely attempts by different peoples at different epochs and under varying conditions, to assure *security of titles.*

The security of titles to land is a matter that vitally affects the public welfare. It is essentially a local matter, and only in a clear case of infringement of constitutional rights will this court interfere.

*Arndt* v. *Griggs,* 134 U. S. 316;

*American Land C.* v. *Zeiss,* 219 U. S. 47;

*United States* v. *Crosby,* 7 Cranch, 437;

*Ballard* v. *Hunter,* 204 U. S. 241;

*Mundy* v. *Wisconsin Trust Co.* 252 U. S. 499.

The following especially interesting cases all deal with the due process clause of the Fourteenth Amendment, and may profitably be consulted in the case at bar.

*Jackman* v. *Rosenbaum Co.,* 260 U. S. 22;

*North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306;

*Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365;

*Von Oster* v. *Kansas*, 272 U. S. 465;

*Cummins* v. *Reading*, 232 U. S. 336.

We have seen that the Torrens act afforded appellants due process of law because it provided for a public hearing and caused to be issued to them in advance a summons (duplicate certificate of title) which would inevitably have procured their attendance before the registrar of titles, if they had not carelessly surrendered it to another. We have also seen that the conditions that existed before the passage of the act called loudly for remedy, and that the underlying principles of the act are well known to the common law. The act is admirably adapted to effectuate the purposes of the legislature, and has been adopted throughout the civilized world. Similar practices were in force in parts of Germany hundreds of years before the discovery of America. It would be absurd to say "that that which has at all times been conceded to be within the power of government" is "so beyond the scope of governmental authority" as to be a want of due process of law.

We respectfully submit (1) that no substantial Federal question is submitted for decision on this record, (2) that appellants have waived their right to question the constitutionality of the Illinois Land Title Registration Act, and (3) that this statute affords owners of registered land due process of law and equal protection of the law. Therefore, the appeal should be dismissed or the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

FLOYD E. THOMPSON,
HENRY JACKSON DARBY,
*Solicitors for Appellees.*

# APPENDIX.

## Synopsis of An Act Concerning Land Titles with pertinent sections quoted in full.

Smith-Hurd Illinois Statutes, Chap. 30, Par. 45, *et seq.*
Cahill's Illinois Statutes, Chap. 30, Par. 49, *et seq.*

Section 1. Recorders of deeds are made registrars of titles.

Section 2. Registrar required to file bond.

Section 3. Registrar required to establish escrow department "where documents and funds may be received and held in escrow pending the closing of transactions affecting registered land or non-registered land in process of registration."

Section 4. Registrar and deputies forbidden to accept engagement as attorney in connection with registered land.

Section 5. Registrar may appoint lawyers as examiners of titles.

Section 6. Registrar liable for omission of duty of himself and/or his deputies.

Section 7. Owner of any estate or interest in land, whether legal or equitable, may apply for registration.

Section 8. No estate may be registered unless fee simple estate is first registered.

Section 9. Every lesser estate or charge shall be noted upon the certificate of title, and the title certified shall be subject only to such estates or charges noted, except as in other sections provided.

Section 10. No tax title shall be registered unless applicant or predecessors have been in actual and undisputed possession for ten years, and have paid taxes for seven years.

Section 11. Application shall be in writing and verified and shall give history of applicant and estate as specified in this section.

Section 12. Several tracts may be registered together.

Section 13. Form of application prescribed.

Section 14. Amendments must be in writing and verified.

Section 15. Application may be made to court of

chancery and it shall have power to determine all interests.

SECTION 16. Applications shall be docketed in "Land Registration Docket."

SECTION 17. All orders shall be minuted in such docket.

SECTION 18. Applications may be referred by court to examiner of titles for hearing and report.

SECTION 19. Summons shall be issued and served as in chancery.

SECTION 20. Notice shall be published for four successive weeks.

SECTION 21. Copy of notice shall be mailed to named defendants, whose addresses are known and who are not personally served.

SECTION 22. Other interested persons may intervene and contest application.

SECTION 23. Application taken as confessed on default.

SECTION 24. Court not bound by report of examiner.

SECTION 25. Court shall find all interests and order registrar to enter same as found.

SECTION 26. Decree entered shall be forever binding and conclusive on all parties to application, except that it may be reviewed by Supreme Court on appeal as in other cases in chancery or by writ of error if sued out within two years. Any person not served who has an interest may have decree opened up if application is made within two years.

SECTION 27. Suits for recovery may be brought within two years where, because of some irregularity, insufficiency or other cause, parties are not bound by decree.

SECTION 28. Persons having interests upon which no cause of action has accrued at time of registration shall file notice of same within two years; and when such notice is filed may bring action within one year after right of action accrues but not afterwards. Life tenant or trustee shall file claim of remainderman or reversioner and guardian of ward.

SECTION 29. Registrar shall register title as decreed.

SECTION 30. Form of certificate of title prescribed.

SECTION 31. Subsequent certificates shall be in same form except shall show transfer number and date of first registration.

SECTION 32. "Heirs and assigns" not necessary to create fee simple.

SECTION 33. Requisites of certificate of title prescribed.

SECTION 34. Tenants in common may receive one certificate for the entirety or each a certificate for undivided share.

SECTION 35. Registrar shall keep a "Register of Titles" wherein shall be entered all first and subsequent original certificates of title.

SECTION 36. "The registrar shall, at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations thereunder noted, which shall be delivered to the owner and shall be known as the owner's duplicate."

SECTION 37. "For the purpose of preserving evidence of the handwriting of the owner in his office, it shall be the duty of the registrar to take from the owner, in every case where it is practicable so to do, his receipt for the certificate of title, or whatever paper shall be issued to him, signed by the owner in person. When such receipt is signed in the registrar's office it may be witnessed by the registrar or some deputy. If signed elsewhere it may be acknowledged before any officer authorized to take acknowledgment of deeds. When so signed and witnessed or acknowledged, such receipt shall be prima facie evidence of the genuineness of such signature."

SECTION 38. "In every case of final registration the certificate of title shall relate back to and take effect as of the date of the order or decree directing the registration, and all dealings with the land and all statutory or other liens upon the same subsequent to the filing of the application shall be subject to such order or decree of the court."

SECTION 39. Until time for contest has expired certificate of title and duplicate shall be prima facie evidence that title is as therein stated, and thereafter conclusive evidence.

SECTION 40. "At the time of issuing any certificate of title to registered property, or of making any transfer of registered property, or of the entry upon the register of titles of any memorial relating to registered property, the registrar of titles shall search for and enter upon the proper folium of the register of titles

memorials as to the following charges upon such registered property, to-wit:

(a) Unpaid general taxes for the year immediately preceding the calendar year in which the certificate of title is issued, or transfer made, or memorial entered, and for which no sale or forfeiture has been had (together with any unredeemed forfeitures for general taxes for prior years extended and added thereto).

(b) Unpaid general taxes, the collection of which has been suspended or held in abeyance, but not permanently enjoined or defeated, by legal or equitable proceedings.

(c) Unredeemed forfeitures for general taxes for the year immediately preceding the calendar year in which the certificate of title is issued, or transfer made, or memorial entered (together with any unredeemed forfeitures for general taxes for prior years extended and added thereto).

(d) Unpaid confirmed special taxes or assessments for which a sale of the land or forfeiture has not been had.

(e) Unredeemed forfeitures for special taxes or assessments.

If at the time the certificate of title is requested to be issued, or transfer requested, or memorial requested to be entered, a sale of the land for any tax or special assessment has been had, and the period for presentation of the certificate of sale to the registrar of titles under section 82 of this Act has not elapsed, said certificate of title shall not be issued or transfer made or memorial entered until proof of the proper deposit for redemption or of the cancellation of such sale has been made to the registrar of titles, or until the holder or holders of the outstanding certificate of title shall file with the registrar of titles a written direction to enter a memorial of such certificate of sale upon the register of titles, which memorials shall be so entered by the registrar of titles before issuing said certificate or making such transfer or entering such memorial so requested.

For such search relating to taxes, special assessments and forfeitures, the registrar of titles shall charge the sum of one dollar, of which fifty cents shall be paid into the general corporate fund of the county and fifty cents

shall be paid into the indemnity fund provided by this Act.

The registered owner of any estate or interest in land brought under this Act shall, notwithstanding any rules of the common law to the contrary except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all other except:

(1) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(2) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

SECTION 41. "After land has been registered no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession."

SECTION 42. "Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

SECTION 43. In suit for specific performance certificate is conclusive evidence of title.

SECTION 44. In an action for possession of land with certain exceptions certificate is conclusive evidence of title.

SECTION 45. Memorials shall be carried forward on certificates until cancelled.

SECTION 46. "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens,

incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

SECTION 47. "A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and *folium* in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'cancelled.'"

SECTION 48. When only part of registered land transferred, memorial transfer may be made on grantor's certificate.

SECTION 49. "Every transfer of registered land shall be deemed to be registered under this act when the new certificate to the transferee shall have been entered, as in the case of first registration; and all other dealings shall be considered as registered when the memorial or notation shall have been entered in the register upon the *foliam* constituted by the existing certificate of title of the land. But, for the protection of the transferee or person claiming through any transfer or dealing, the registration shall relate back to the time of filing in the registrar's office the deed, instrument or notice, pursuant to which the transfer, memorial or notation is made."

SECTION 50. Registrar shall mark as filed deeds, etc., filed in his office.

SECTION 51. All instruments filed shall remain in registrar's office.

SECTION 52. Deeds, etc., sufficient in law may be used.

SECTION 53. Addresses of interested persons must be kept with registrar.

SECTION 54. "A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

SECTION 55. Provision respecting tax sales, dower, etc., on registration of transfer.

SECTION 56. Certificate shall state marital status.

SECTION 57. Provision for separate or joint certificates for several parcels.

SECTION 58. Provision for procuring copy of original certificate where owner's duplicate is lost.

SECTIONS 59-66. Provisions relating to mortgages, leases and other charges.

SECTION 67. Power of attorney must be filed and entered.

SECTIONS 68-92. Provisions relating to trusts, conditions, limitations, transmission upon death of owner, dealings of assignees, receivers and masters, tax sales, *lis pendens*, judgments, attachments, executions, liens, memorials of adverse claims, etc.

SECTION 93. "Whenever any person interested in registered land, or any estate or interest therein, or charge upon the same, shall be entitled to have any certificate of title, memorial or other entry upon the register cancelled, removed or modified, and the registrar or person whose duty it shall be to cancel, remove or modify the same, shall upon request, fail or refuse so to do, or is absent from the county, or can not be found, or for any reason such request cannot be made upon him, or where under the provisions of this Act the registrar has no power or authority to make a transfer until he shall have been di-

rected so to do by an order of court, the circuit court of the county where the land is registered, may upon petition by the person interested, make such order as may be according to equity in the premises.

And in every proceeding in which a final decree shall have been entered directing the registration of any tract or parcel of land the court shall retain jurisdiction to enter any order which may be proper to give effect to the provisions of this section."

SECTION 94. "Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act in any matter pertaining to the first registration of land, or any estate or interest therein, after the first registration of any transfer of or charge upon the same, the filing or neglect or refusal to file any instrument, or to enter or cancel any memorial or notation, or to do any other thing required of him by this Act, may file his petition in the circuit court in the proceeding in which the land was registered, making the registrar and other persons, whose interest may be affected, parties defendant, and the court may proceed therein and make such order or decree as shall be according (to) equity in the premises and the purport of this Act. Nothing in this section contained shall bar such person from filing an original bill or petition in such cases in equity in any court of competent jurisdiction."

SECTION 95. "Nothing contained in either of the two preceding sections shall be so construed as to remove the bar of any order or decree, or extend the time of limitation hereinbefore provided, nor to affect the right of any *bona fide* purchaser or incumbrancer without notice filed with the registrar and noted as in case of other memorials."

SECTION 96. Court may award damages including attorneys' fees to be paid from indemnity fund.

SECTIONS 97-98. Registrar shall keep indices.

SECTIONS 99-100. Registrar shall collect upon initial registration sum equal to one-tenth of one per cent of value of land registered and pay it into the county treasury to be held as an indemnity fund.

SECTION 101. "Any person sustaining loss or damage through any omission, mistake or misfeasance of the registrar, or of any examiner of titles, or of any deputy or clerk of the registrar in the performance of their respective duties under the provisions of this Act, and any

persons wrongfully deprived of any land or any interest therein, through the bringing of the same under the provisions of this Act, or by the registration of any other person as owner of such land, or by any mistake, omission or misdescription in any certificate, or in any entry or memorandum in the register book, or by any cancellation, and who by the provisions of this Act is barred or in any way precluded from bringing an action for the recovery of such land or interest therein, or claim upon the same, shall have a right of action for the damages thus sustained against the county in which such land shall be registered, and may file a claim with the county board, or bring an action at law against the county in which said land is situated for the recovery of such damages."

SECTIONS 102-103. Proceedings for collection of claim and limitation of action.

SECTIONS 104-106. Penalties for fraud, forgery, etc.

SECTION 107. Fees of clerk of court.

SECTION 108. Fees of registrar.

SECTION 108a. Application of Act to pending cases.

SECTION 109. "This act shall be construed liberally so far as may be necessary for the purpose of effecting its general intent."

SECTION 110. "The provisions of this act shall not apply to land in any county until this act shall have been adopted by a vote of the people of the county" at a general election.

SECTION 111. Emergency clause meaning act received vote of more than two-thirds of all members elected to each house.

## POINTS MADE BY APPELLANTS.

in the Supreme Court of Illinois as shown by clerk's certificate on file.

I.

Unless it be by virtue of some provision of the Land Titles Act, no title to real property can pass by virtue of a forged deed.

[Citations]

II.

Sections 40 and 42 of the Land Titles Act do not, by their terms, include registered titles based upon forged instruments and there is no provision in said act covering such titles.

[Citations]

III.

If Sections 40 and 42 of the Land Titles Act be held to cover by their terms registered titles based upon forged instruments, said Sections 40 and 42 are unconstitutional and prohibited by Amendment V to the United States Constitution and Section 2 of Article II of the Constitution of Illinois.

[Citations]

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Rule 15 of the Rules of Practice of the Supreme Court of Illinois, in force at the time of the hearing of this cause and appearing at page 16 of Volume 319 of the Official Reports of said court, in so far as it applies to the points which will be considered by the court, reads as follows:

> "Each party shall file a printed brief in the cause. * * * No alleged error or point not contained in such brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

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Certificate of Charles W. Vail, Clerk of the Supreme Court of Illinois, showing that the three points stated above are the only points raised by appellants in their principal brief in that court, and also showing the pertinent provision of Rule 15 of the Rules of Practice of that court then in effect.

# MOTION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

**No. 347**

EDWARD ELIASON and ELIN ELIASON,
*Appellants,*

*vs.*

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

## MOTION OF NATIONAL ASSOCIATION OF REAL ESTATE BOARDS FOR LEAVE TO APPEAR AND JOIN IN BRIEFS.

NATHAN WILLIAM MACCHESNEY,
Counsel for National Association of Real Estate Boards.

BARNARD & MILLER PRINT, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347.

---

EDWARD ELIASON and ELIN ELIASON,

*Appellants,*

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,

*Appellees.*

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

---

## MOTION.

The National Association of Real Estate Boards, a corporation not for pecuniary profit, organized and existing under and by virtue of the laws of the State of Illinois, hereby asks leave to appear in the above entitled case as *amicus curiae* by its General Counsel and to join in the Brief of Appellee and the Brief and Argument of Clayton F. Smith, Registrar of Titles of Cook County, Illinois on Merits of Case, filed herein.

NATHAN WILLIAM MACCHESNEY,
*General Counsel for*
*National Association*
*of Real Estate Boards.*

## STATEMENT IN SUPPORT OF MOTION.

The National Association of Real Estate Boards was organized as a corporation not for pecuniary profit in 1908 with the object of uniting the real estate men of America for the purpose of exerting effectively a combined influence upon matters affecting real estate interests.

The membership of the National Association of Real Estate Boards consists of local real estate boards. This membership is now made up of 625 Constituent Member Boards throughout the United States and Canada (8 boards in Canada) which local boards have a total membership of nearly 40,000. Affiliated with the National Association of Real Estate Boards are 33 state associations of real estate boards which represent in an intimate way the real estate interests of the states. In the 22 states and territories of the United States in which land registration acts have been enacted there are 287 Constituent Members Boards of the National Association of Real Estate Boards which have a total membership of over 21,000. The total membership of the 34 Member Boards in Illinois is over 4,400. For 16 of these states there are also state associations of real estate boards.

The activities of the National Association of Real Estate Boards are carried on largely through subsidiary organizations known as Divisions. There are 10 such Divisions: Appraisal Division, Brokers' Division, Cooperative Apartment Division, Farm Lands Division, Home Builders and Subdividers Division, Industrial Property Division, Mortgage and Finance Division, Property Management Division "Realtor" Secretaries Division and Property Owners Division. These Divisions are organized for practical re-

search, for raising the standards of the business and for protecting real estate.

The entire membership of the National Association of Real Estate Boards and all of its Divisions approve the general purpose of the Torrens System of registration of land titles. The 21,000 members of the constituent real estate boards in states now having such laws are interested in maintaining and improving them. The whole membership is interested in extending the system to other states.

The Code of Ethics of the National Association of Real Estate Boards begins with the phrase "Under all is the land." Consequently the interest of the membership of the national organization in this case centers in two basic ideas:

(a) Sound titles of land, and

(b) Simplification of the transfer of land.

These principles are particulary vital to home builders and to members of the Property Owners Division.

The National Association of Real Estate Boards favors the Uniform Land Registration Act drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1916 (Handbook of National Conference, 1928, p. 580), and approved by American Bar Association in the same year (Reports of American Bar Association, Vol. XLI, pp. 26, 428). This uniform act is similar in character to the Torrens Act adopted in the various states.

For these reasons, it is the concern of the National Association of Real Estate Boards, and of its Member Boards throughout the United States and Canada, to defend the Illinois Torrens Act against constitutional attack in this court. It is for this purpose that the National Association

of Real Estate Boards asks leave to appear and to join in the briefs filed in support of the law.

Respectfully submitted,

NATHAN WILLIAM MACCHESNEY,
*General Counsel for*
*National Association*
*of Real Estate Boards.*

MACCHESNEY, WHITEFORD & WELLS,
*Of Counsel.*

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CHARLES EL

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

**No. 347**

EDWARD ELIASON and ELIN ELIASON,
*Appellants,*

*vs.*

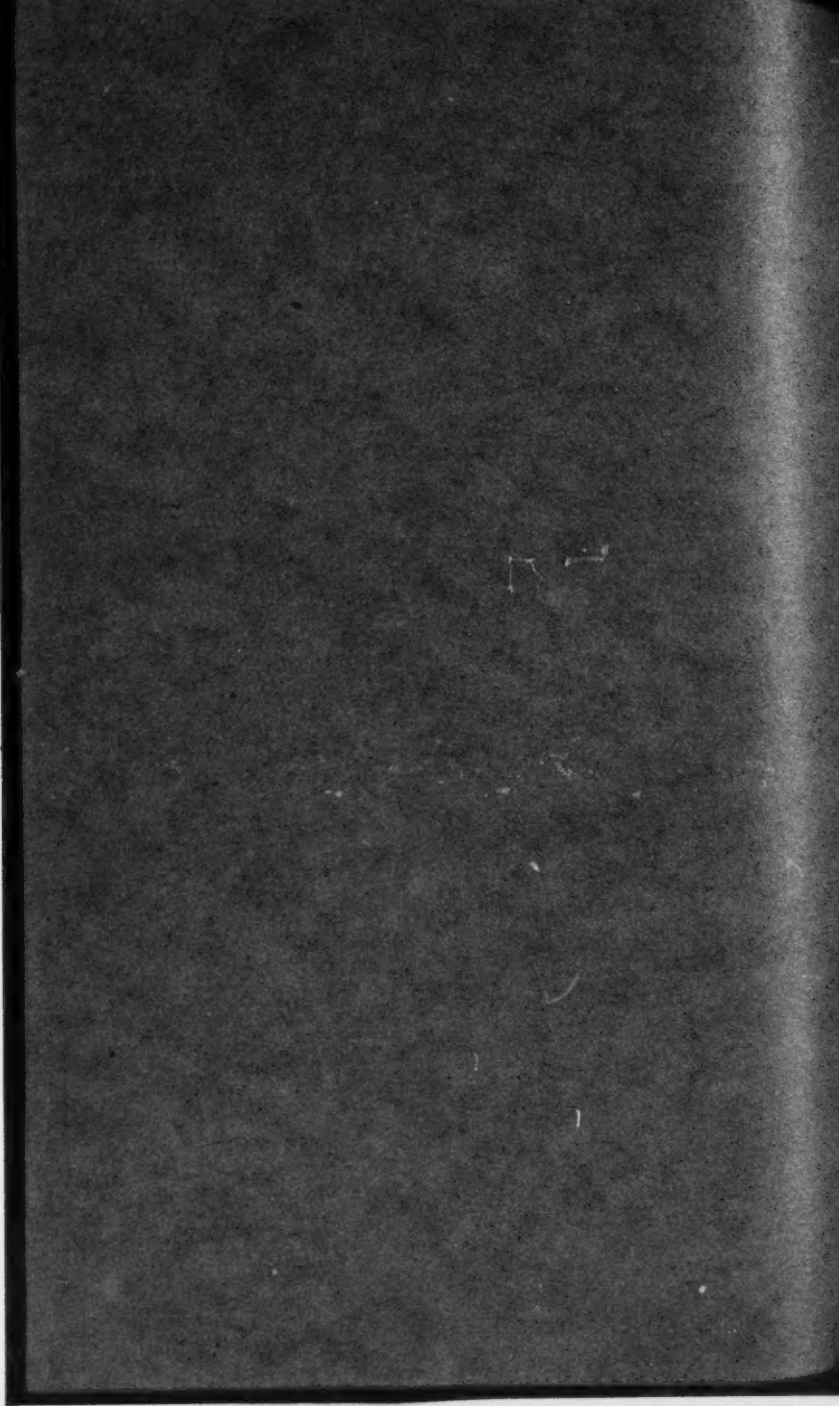
CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

## MOTION OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS FOR LEAVE TO APPEAR AND JOIN IN BRIEFS.

NATHAN WILLIAM MACCHESNEY,
Attorney and Counsel for National Conference of Commissioners on Uniform State Laws.

BARNARD & MILLER PRINT, CHICAGO



IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347.

---

EDWARD ELIASON and ELIN ELIASON,

*Appellants,*

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,

*Appellees.*

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

---

## MOTION.

The National Conference of Commissioners on Uniform State Laws hereby asks leave to appear in the above entitled case as *amicus curiae* by its attorney and counsel and to join in the Brief of Appellee and Brief and Argument of Clayton F. Smith, Registrar of Titles of Cook County, Illinois, on Merits of Case, filed herein.

NATHAN WILLIAM MACCHESNEY,
*Attorney and Counsel for*
*National Conference of Commissioners*
*on Uniform State Laws.*

## STATEMENT IN SUPPORT OF MOTION.

The National Conference of Commissioners on Uniform State Laws in 1916 drafted and approved "An Act to Provide for the Settlement, Registration, Transfer, and Assurance of Titles to Land, and to Establish or Designate Courts of Land Registration, with Jurisdiction for Said Purposes, and to Make Uniform the Laws of the States Enacting the Same," which, Section 1 provides, may be cited as The Uniform Land Registration Act (Handbook, National Conference 1928, p. 580). The American Bar Association approved this uniform act the same year, 1916, and recommended it for enactment by the legislatures of the various states. (Reports of American Bar Association, Vol. XLI, pp. 26, 428.) The Commissioners' Note appended to the Act shows it is similar to the statutes obtaining in a number of the states (9 Uniform Laws Annotated 150). The Uniform Land Registration Act has been adopted in Georgia, Utah and Virginia.

§74 of the uniform act provides that every registered owner under it shall hold the land free of any adverse claims, rights or encumbrances (with three exceptions). §75 of the uniform act provides that §74 shall not apply to the benefit of the registered owner in cases of fraud or *forgery* to which he is a party or in which he is a privy without valuable consideration paid in good faith. This section (§75 of the uniform act) is similar to Section 40 of the Torrens Act of Illinois except that the word *forgery* does not appear in the Illinois Act.

The appellants contended in the Supreme Court of Illinois that, if sections 40 and 42 of the Illinois Act be held to cover registered titles based upon forged instruments, they are unconstitutional; in other words, if section 40 of

the Illinois Act is construed to include *forgery* (which is specifically included in the uniform act), it is unconstitutional.

It is particularly for this reason that the National Conference of Commissioners on Uniform State Laws is interested in the defense of the Illinois Act against the attack that it is unconstitutional in the respect claimed by the appellants, and asks leave to appear and join in the briefs supporting the law.

NATHAN WILLIAM MACCHESNEY,
*Attorney and Counsel for*
*National Conference of Commissioners*
*on Uniform State Laws.*

MACCHESNEY, WHITEFORD & WELLS.
*Of Counsel.*

FILE COPY

FILED
MAR 13 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

October Term, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,
*Appellants*

v.

CHARLES WILBORN, CARRIE WILBORN and NOEL STATE BANK,
*Appellees.*

Appeal from Supreme Court of Illinois.
There Heard on Appeal from Circuit Court
of Cook County.

## MOTION TO PASS CASE AND SUGGESTIONS IN SUPPORT THEREOF.

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FLOYD E. THOMPSON,
*Solicitor for Appellees.*

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.

IN THE

# Supreme Court of the United States

October Term, A. D. 1929.

**No. 347.**

EDWARD ELIASON and ELIN ELIASON,
*Appellants.*

v.

CHARLES WILBORN, CARRIE WILBORN and NOEL STATE BANK,
*Appellees.*

## MOTION TO PASS CASE AND SUGGESTIONS IN SUPPORT THEREOF.

### MOTION TO PASS CASE.

Come now appellees, by their solicitor, Floyd E. Thompson, and move that this case be passed until the week of May 5, 1930, if arguments are to be heard during that week, or, in the alternative, that said case be passed to the middle of the week of April 28, 1930, for the reasons assigned in the suggestions filed herewith.

CHARLES WILBORN,
CARRIE WILBORN,
NOEL STATE BANK,
By Floyd E. Thompson,
*Their Solicitor.*

## SUGGESTIONS IN SUPPORT OF MOTION.

State of Illinois,
County of Cook—ss.

FLOYD E. THOMPSON, being first duly sworn, on his oath states:

He is a member of the bar of this honorable Court and the principal solicitor for appellees in this cause. He was specially employed by the Cook County Real Estate Board, with the consent of appellees, to appear on behalf of appellees to defend their interests and the interests of the Registrar of Titles of Cook County, Illinois, and of the members of the Cook County Real Estate Board and their clients, who have lands registered under the act entitled, "An Act Concerning Land Titles", approved May 1, 1897. (Laws of Illinois of 1897, p. 141.)

This cause involves the validity of the Illinois statute concerning land title registration known as "The Torrens Act". The decision of this honorable Court in this case will affect the title to thousands of pieces of real estate in Cook County, Illinois, registered under the act, which are in the aggregate worth more than a billion dollars. This cause was set for argument for the week of March 10, 1930, and counsel for both parties were ready to argue the case when it was reached on the call. Adjournments of this honorable Court caused by the deaths of the late Chief Justice Taft and the late Justice Sanford required the passing of the case to the session beginning the week of April 14.

This affiant is one of the solicitors for the defendants in the case of *William Burry, Jr., and Charles Y. Free-*

*man, executors of the will of Suzanne King Bruwaert, v. J. Andrews King, et al.*, now pending in the Superior Court of Cook County, Illinois, as No. 506894. In the defense of this case it is necessary for affiant to be in Paris, France, and Lausanne, Switzerland, for at least three weeks beginning March 31, 1930, where depositions are to be taken of witnesses called by solicitors for complainants and by solicitors for defendants in said cause.

Affiant will not be able to return to the United States prior to April 28, 1930. He will make every effort to be present before this honorable Court to present the case at bar on behalf of appellees, if the case is passed to a day later than April 28, 1930. It is the desire of affiant's clients that he present this case by oral argument, and they are not willing that associate counsel be substituted.

Floyd E. Thompson.

Subscribed and sworn to before me this 11th day of March, 1930.

Irene A. Zeisler,
Notary Public.

(Notarial Seal)

Chicago, Illinois, March 11, 1930.

The undersigned solicitors for appellants this day acknowledge receipt of six copies of the foregoing motion and suggestions in support thereof, and say that they have no objection to the allowance of said motion.

Matthias Concannon,
Franklin E. Vaughan,
*Solicitors for Appellants.*

FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

## No. 347

EDWARD ELIASON and ELIN ELIASON,
*Appellants,*

*vs.*

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

## MOTION FOR LEAVE TO FILE CERTIFIED COPY OF OPINION.

MATTHIAS CONCANNON,
*Counsel for Appellants.*

FRANKLIN E. VAUGHAN,
*Of Counsel.*

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

(34,478)

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,
*Appellants,*

*vs.*

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

## MOTION FOR LEAVE TO FILE CERTIFIED COPY OF OPINION.

Now come the appellants, Edward Eliason and Elin Eliason, by Matthias Concannon and Franklin E. Vaughan, their attorneys, and move the court for leave to file a certified copy of the opinion of the Supreme Court of Illinois in the case of Sheaff v. Duplissis, *et al.*, for the reasons assigned in the suggestions filed herewith.

EDWARD ELIASON,
ELIN ELIASON,
By: MATTHIAS CONCANNON,
FRANKLIN E. VAUGHAN,
*Their Attorneys.*

SUGGESTIONS IN SUPPORT OF MOTION.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Matthias Concannon, being first duly sworn, says that he is one of the attorneys for the appellants in the above entitled cause; that the Supreme Court of Illinois on April 17, 1930, delivered an opinion in the case of Sheaff v. Duplissis, *et al.*, which is cited and quoted from in appellants' reply brief about to be filed in this cause.

Affiant further says that the time within which application may be made for a rehearing in the case of Sheaff v. Duplissis, *et al.*, has not yet expired, and the case therefore is subject to further consideration by the Supreme Court of Illinois. The opinion of that Court has not yet been published. Appellants desire to obtain leave to file a certified copy of the opinion aforesaid for the purpose of making the whole opinion available to the Court.

MATTHIAS CONCANNON.

Subscribed and sworn to before me this 23rd day of April, A. D. 1930.

LOUISE BERG,

(NOTARIAL SEAL) *Notary Public.*

Chicago, Illinois, April 24, 1930.

The undersigned hereby acknowledge receipt of six (6) copies of the foregoing motion and suggestions in support thereof.

FLOYD E. THOMPSON,

HENRY JACKSON DARBY,
*Attorneys for Appellees.*

J. SCOTT MATTHEWS,
*Counsel for Registrar of Titles.*

# OPINION

# SUPREME COURT OF THE UNITED STATES.

No. 347.—October Term, 1929.

| | |
|---|---|
| Edward Eliason and Elin Eliason, Appellants, *vs.* Charles Wilborn, Carrie Wilborn, and Noel State Bank. | Appeal from the Supreme Court of the State of Illinois. |

[May 19, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

The appellants had been holders of a certificate of title under the Torrens Act of Illinois. As a result of negotiations they entrusted this certificate to one Napletone, who is alleged to have presented it together with a forged conveyance to himself to the Registrar and by those means to have obtained from the Registrar a new certificate of title in Napletone, on May 19, 1926. Napletone a few days later sold and conveyed to the Wilborns, appellees, whose good faith is not questioned. After the Wilborns had bought but before a new certificate was issued to them, they had notice of the appellants' claim and the appellants notified the Registrar of the forgery and demanded a cancellation of the deeds and certificates to Napletone and the Wilborns and the issue of a certificate to themselves. The Registrar refused and this petition is brought to compel him to do what the appellants demand. It was dismissed on demurrer by the Circuit Court of the State, and the judgment was affirmed by the Supreme Court. 335 Ill. 352. The Supreme Court construed the statutes as giving title to the Wilborns, who purchased in reliance upon the certificate held by Napletone. Whether we are bound to or not we accept that construction and its result. The petitioners appealed to this Court on the ground that the statute, construed as it was construed below, deprived the appellants of their property without due process of law contrary to the Constitution of the United States, by making the certificate of title issued by the Registrar upon a forged deed without notice to them conclusive against them.

The sections objected to are appended. They are as in the original Act of 1897, except § 40, amended by the laws 1925, p. 250.*

*Section 40:

"The registered owner of any estate or interest in land brought under this Act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1) Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall include a verbal letting.

(2) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

Section 42:

"Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46:

"The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47:

"A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the

The appellants seem to claim a constitutional right to buy land that has been brought under the Torrens Act free from the restrictions that that Act imposes. But they have no right of any kind to buy it unless the present owner assents, and if, as in this case, the owner from whom the appellants bought, offered and sold nothing except a Torrens title we do not perceive how they can complain that that is all that they got. Even if the restrictions were of a kind that was open to constitutional objection the appellants bought knowing them and got what they paid for, and knew that they were liable to lose their title without having parted with it and without being heard. Even if they had been the original holders under the Torrens Act and had attempted to save their supposed rights by protest the answer would be that they were under no compulsion when they came into the system, that an elaborate plan was offered of which the provisions objected to were an important part, and that they could take it as it was or let it alone. There are plenty of cases in which a man may lose his title when he does not mean to. If he entrusts a check indorsed in blank to a servant or friend he takes his chance. So when he entrusts goods to a bailee under some factors' acts that are well

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original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled'."

Section 54:

"A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 58, (omitting immaterial parts):

"In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner . . . may make affidavit . . . and the registrar, if satisfied as to the truth of such affidavit and the *bona fide* of the transaction, shall issue to the owner a certified copy of the original certificate . . . and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

known. So, more analogous to the present case, a man may be deprived of a title by one who has none; as when an owner who has conveyed his property by a deed not yet recorded executes a second deed to another person who takes and records the later deed without notice of the former. There are few constitutional rights that may not be waived.

But there is a narrower ground on which the appellants must be denied their demand. The statute requires the production of the outstanding certificate, as a condition to the issue of a new one. The appellants saw fit to entrust it to Napletone and they took the risk. They say that according to the construction of the act adopted the Registrar's certificate would have had the same effect even if the old certificate had not been produced. But that, if correct, is no answer. Presumably the Registrar will do his duty, and if he does he will require the old certificate to be handed in. It does not justify the omission of a precaution that probably would be sufficient, to point out that a dishonest official could get around it. There is not the slightest reason to suppose that Napletone would have got a certificate on which the Wilborns could rely without the delivery of the old one by the appellants. As between two innocent persons one of whom must suffer the consequence of a breach of trust the one who made it possible by his act of confidence must bear the loss.

*Decree affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*